CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 766

SAMUEL ZIMMERN, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 20, 1936.

CERTIORARI GRANTED MARCH 2, 1936.

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[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF ALABAMA

In Equity. No. 132

UNITED STATES OF AMERICA

vs.

SAMUEL ZIMMERN, LEILA ZIMMERN, SAMUEL JOSEPH ZIMMERN, JR., Bernice L. Levinshon, and Janice Zimmern

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Jan. 22, 1935

To the Hon. Virgil C. Griffin, Clerk of the U. S. District Court, for the Southern Division of Southern District of Alabama:

Præcipe indicating parts of record to be incorporated into transcript on appeal.

We respectfully request that you prepare the transcript of the record for this appeal, and that the following portions of the record be incorporated into said transcript, viz: (1) The bill of complaint, (2) The answer of the Defendants, (3) The statement of the evidence in the case, (4) The opinion and decree of the Court, (5) The petition for appeal, (6) The assignments of error, (7) Bond on appeal, (8) The citation on appeal, (9) and the Clerk's Certificate.

Norman H. Rattner, Jesse F. Hogan, Solicitors for Appellants.

We acknowledge service of a copy of the foregoing præcipe. Dated this 22nd day of January, 1935.

J. E. Meredith, Assistant U. S. Attorney, Solicitor for United States of America.

[File endorsement omitted.]

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Feb. 15, 1935

Come now Norman H. Rattner and Jesse F. Hogan, representing appellants, and Alex C. Birch, U. S. District Attorney, and J. E. Meredith, Assistant U. S. District Attorney, representing appellee and agree that the præcipe be amended so as to include the following additional papers, viz.:

1. Amendment to Bill of Complaint.
2. Order allowing amendment.
3. Amended answer of Respondent.
4. Exceptions to amended answer.
5. Order of submission.
6. Order extending term.
7. Amended petition for Rehearing, dated Aug. 10, 1934.
8. Order dated Aug. 13, 1934 amending decree of March 3, 1934.
9. Petition of Leila Zimmern for Appeal. Petition of Samuel Zimmern for Appeal. Petition of Samuel Joseph Zimmern, Jr., and Janice Zimmern for Appeal.
10. Order Allowing Appeal.
11. Order certifying exhibits "A", "B", and "C".
12. Original and Amended præcipe.

Norman H. Rattner, Jesse F. Hogan, Solicitors for Appellants. Alex C. Birch, Solicitors for Appellee.

[File endorsement omitted.]

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed Oct. 15, 1929

To the Honorable Robert T. Ervin, Judge of the United States District Court for the Southern District of Alabama:

Complainant, United States of America, by its Attorney, Alex C. Birch, United States Attorney for the Southern

District of Alabama, exhibits this bill of complaint against Samuel Zimmern, Leila Zimmern, Samuel Joseph Zimmern, Jr., Berenice L. Levinsohn and Janice Zimmern, and avers and alleges as follows:

1

Complainant is a corporation sovereign and body politic, and was such at all times mentioned in this original bill of complaint.

2

That the defendants, Samuel Zimmern and Leila Zimmern, are each over the age of twenty-one years and residents of the City of Mobile, Alabama, which is in the Southern Division of the Southern District of Alabama; and that the said Samuel Joseph Zimmern, Jr., and Janice Zimmern are over the age of eighteen years and under the age of twenty-one years, and are both residents of the City of Mobile, in said judicial district, and that the said Berenice L. Levinsohn is over the age of eighteen years and is a married woman, and a resident of the city of Binghamton, State of New York; and that all of the real estate hereinafter described and mentioned in the succeeding paragraphs of this bill is located in said city of Mobile, Alabama, within the bounds of the Southern Judicial District of Alabama.

[fol. 5]

3

That this cause is a suit in equity by the United States of America and is of a civil nature arising under the Laws of Congress providing for internal revenue, and is sanctioned and authorized by the Commissioner of Internal Revenue.

4

Complainant further avers that pursuant to the provisions of the Act of Congress approved February 24th, 1919, and entitled "An Act to Provide Revenue and For Other Purposes", one of the defendants, Samuel Zimmern, on, to-wit, the 11th day of March, 1921, filed with the Collector of Internal Revenue for the District of Alabama, an individual income tax return for the calendar year 1920, which return purported to be a true, correct and accurate statement of profits, gains and income received from all sources or accrued to the said Samuel Zimmern during the year end-

ing December 31, 1920, and that such return showed a tax to be due to complainant in the sum of $17,192.33, and that such amount was paid by the said Samuel Zimmern to the Collector of Internal Revenue for the District of Alabama.

5

Complainant further avers that subsequent to the filing of said return, the Commissioner of Internal Revenue, acting upon additional information and facts submitted to him, directed a review and audit of the income tax of the said Samuel Zimmern for the calendar year 1920, and that as a result of such review and audit it was determined by the Commissioner that the tax return filed by the said Zimmern was incorrect, misleading and false; that the said Samuel Zimmern was thereafter advised in due course of the tax deficiency due by him for the year 1920 in the sum of $66,151.78, and thereafter the defendant, Samuel Zimmern, prosecuted an appeal to the Board of Tax Appeals, which administrative body on, to-wit, the 17th day of January, 1928, made and entered an order sustaining the action of the Commissioner of Internal Revenue, and thereafter on February 26th, 1928, an order of redetermination was [fol. 6] entered; that on, to-wit, June 27, 1928, the said Samuel Zimmern filed his petition to review the order of the Board of Tax Appeals in the United States Circuit Court of Appeals for the Fifth Judicial Circuit; that on the July, 1928, list the additional assessment against the said Samuel Zimmern in the said sum of $66,151.78 was made pursuant to the Order of the Board of Tax Appeals; that on, to-wit, the 25th day of October, 1928, the said Circuit Court of Appeals rendered its decision in favor of the defendant and against the Commissioner in such appeal, and remanded the cause to the Board of Tax Appeals for further proceedings, and thereafter an order of the Board of Tax Appeals was duly signed, filed and entered in accordance with said decision, fixing the additional tax due for said year, 1920, in the sum of $53,236.51, and that a certificate of overassessment was issued in the amount of $14,776.99, pursuant to said decision of the Court of Appeals. Complainant avers that the said amount of $53,236.51, which was part of the original deficient assessment of $66,151.78, now remains due and unpaid, and that the time for appeal from the order of the Board of Tax Appeals

from the additional assessment so made and entered has expired.

6

Complainant further represents and shows unto the court that on, to-wit, the 25th day of January, 1928, one of the defendants, Samuel Zimmern, made, executed and delivered to Leila Zimmern, one of the defendants in this cause, and who was then and is now the wife of the said Samuel Zimmern, a deed transferring all of his right, title and interest in and to the following described property:

That certain dwelling known as 1116 Government Street, formerly No. 972½ Government Street, in the City of Mobile, Alabama, together with the entire lot of land upon which it is situated and adjacent thereto being the same property conveyed to the said Samuel Zimmern by Dr. Seale Harris and wife. Complainant avers that said deed [fol. 7] is found recorded in Deed Book No. 218, N. S., at Page 230, in the office of the Judge of Probate of Mobile County, Alabama. Complainant attaches a copy of said deed to this bill of complaint, and has marked such copy "Exhibit A", and prays that such exhibit be referred to and made a part of this original bill of complaint as fully as if it were incorporated therein.

7

Complainant avers that the conveyance by the said Samuel Zimmern to his wife, Leila Zimmern, described in the foregoing paragraph of this complaint was voluntary and without consideration, and was a deed of gift by the said Samuel Zimmern to his wife, Leila Zimmern, at a time when complainant was an existing creditor of the said Samuel Zimmern. Complainant avers as a matter of law that complainant being an existing creditor of said Samuel Zimmern at the time of the voluntary conveyance of said property described in the preceding paragraph, such transfer and conveyance is null and void as to complainant.

8

Complainant avers that if it be mistaken in its averment that the deed of said Samuel Zimmern to his wife, Leila Zimmern, described in a preceding paragraph of this bill, was a deed of gift and was without consideration passing

from the grantee to the grantor and was entirely voluntary, then this complainant avers that said deed so made, executed and delivered as aforesaid by the said Samuel Zimmern to his wife, Leila Zimmern, conveying the property hereinbefore described to his said wife, was made, executed and delivered with full knowledge on the part of said Samuel Zimmern and his wife, Leila Zimmern, that an income tax was due and owing to the complainant in a large amount for the year 1920, and was executed intentionally, deliberately, designedly and fraudulently for the express purpose of avoiding and preventing the collection of such tax, and with intent to hinder, delay or defraud complainant, who at such time of said transfer was an existing creditor of the defendant, Samuel Zimmern. Complainant [fol. 8] further avers that said transfer of said property was made on, to-wit, January 25th, 1928, immediately following the decision of the Board of Tax Appeals entered on January 17th, 1928, confirming the action of the Commissioner of Internal Revenue in making the additional assessment for income taxes for the year 1920, and was made with the intent of said defendant to make such tax uncollectible, and that by reason of such transfer and another transfer hereinafter described, the said tax was, and at all times since, to-wit, January 26, 1928, has been, made uncollectible, although timely and diligent efforts have been made to collect the same, as said Samuel Zimmern, by reason of said transfers, was left without money, assets or property from which said tax due and owing to complainant can be collected.

9

Complainant further represents and shows unto the Court that on, to-wit, the 26th day of January, 1928, two of the Defendants, Samuel Zimmern and his wife, Leila Zimmern, made, executed and delivered to Samuel Joseph Zimmern, Jr., Berenice L. Levinsohn and Janice Zimmern, three of the defendants in this cause, and who were then and there and are now the children of the said Samuel Zimmern and Leila Zimmern, a deed transferring all of their right, title and interest in and to the following described property:

That lot of land with the improvements thereon situated on the West side of Royal Street, Second South of St. Michael Street, in Mobile, Alabama, having a front of about

63 feet, 6 inches more or less on the West side of Royal Street, and running westwardly about 99 feet more or less of the depth of said lot of land; said lot of land being bounded on the North by a property now or formerly of the Mobile Register and East by Royal Street, and said property being known as Nos. 55-57 and 59 No. Royal Street, together with all and singular the tenements, hereditaments, rights, members, privileges and appurtenances thereunto belonging or in any wise thereunto pertaining; that the property herein described is located in the City [fol. 9] of Mobile, County of Mobile, State of Alabama.

Complainant attaches a copy of said deed to this bill of complainant, and has marked such copy "Exhibit B", and prays that such exhibit be referred to and made a part of this original bill of complaint as fully as if it were incorporated therein. Complainant avers that said deed is found recorded in Deed Book No. 218, N. S., Page 236, in the office of the Judge of Probate of Mobile County, Alabama. Defendant, Leila Zimmern, joined in said conveyance solely for the purpose of conveying her dower rights, title to such property being in the said Samuel Zimmern.

10

Complainant avers that the conveyance by the said Samuel Zimmern and his wife, Leila Zimmern, described in the foregoing paragraph of this complaint was voluntary and without consideration, and was a deed of gift by the said Samuel Zimmern and his wife, Leila Zimmern, to the said Samuel Joseph Zimmern, Jr., Berenice L. Levinsohn and Janice Zimmern, their children, at a time when complainant was an existing creditor of the said Samuel Zimmern. Complainant avers as a matter of law that complainant being an existing creditor of said Samuel Zimmern at the time of the voluntary conveyance of said property described in the preceding paragraph, such transfer and conveyance is null and void as to complainant.

11

Complainant avers that if it be mistaken in its averment that the deed of said Samuel Zimmern and his wife, Leila Zimmern, to the said Samuel Joseph Zimmern, Jr., Berenice L. Levinsohn and Janice Zimmern, their children, described in a preceding paragraph of this bill, was a deed

of gift and was without consideration passing from the grantees to the grantors and was entirely voluntary, then this complainant avers that said deed so made, executed and delivered as aforesaid by the said Samuel Zimmern and his wife, Leila Zimmern, to the said Samuel Joseph Zimmern, Jr., Berenice L. Levinsohn and Janice Zimmern, conveying the property hereinbefore described to the said [fol. 10] Samuel Joseph Zimmern, Jr., Berenice L. Levinsohn and Janice Zimmern, was made, executed and delivered with full knowledge on the part of the said Samuel Zimmern and his wife, Leila Zimmern, and the said Samuel Joseph Zimmern, Jr., Berenice L. Levinsohn and Janice Zimmern, that an income tax was due and owing to the complainant in a large amount for the year 1920, and was executed intentionally, deliberately, designedly and fraudulently for the express purpose of avoiding and preventing the collection of such tax, and with intent to hinder, delay or defraud complainant, who at such time of said transfer was an existing creditor of the defendant, Samuel Zimmern. Complainant further avers that said transfer of said property was made on, to-wit, January 26th, 1928, immediately following the decision of the Board of Tax Appeals entered on January 17th, 1928, confirming the action of the Commissioner of Internal Revenue in making the additional assessment for income taxes for the year 1920, and was made with the intent of said defendant to make such tax uncollectible, and that by reason of such transfer and another transfer hereinabove described, the said tax was, and at all times since, to-wit, January 26, 1928, has been made, uncollectible, although timely and diligent efforts have been made to collect the same, as said Samuel Zimmern, by reason of said transfers, was left without money, assets or property from which said tax due and owing to complainant can be collected.

12

Complainant further avers that the said Samuel Zimmern is indebted to it in the sum of $53,236.51, with interest, from, to-wit, the 25th day of October, 1928, as an additional income tax for the year 1920, and that the property hereinbefore specifically described in the several paragraphs of this bill is held in trust by the defendants for

the discharge and payment of such indebtedness due to complainant.

Wherefore, premises considered, complainant prays that [fol. 11] Samuel Zimmern, Leila Zimmern, Samuel Joseph Zimmern, Jr., Berenice L. Levinsohn and Janice Zimmern be made parties defendant in this cause, and that due process issue requiring them and each of them to plead or answer to this original bill of complaint within the time prescribed by law and the rules of this Court; that a guardian ad litem be appointed by this Court for the unmarried minor defendants to this bill, to-wit, Samuel J. Zimmern, Jr., and Janice Zimmern, and that due process of this Court be issued to said guardian ad litem requiring such guardian ad litem to defend and protect the interests of such minor defendants.

On final hearing of this cause defendant prays that the deed from defendant, Samuel Zimmern, to his wife, Leila Zimmern, dated January 25th, 1928, and described in Paragraph 6 of this bill, be declared and held to be fraudulent, and that such deed be set aside, annulled, cancelled and held for naught, and declared void as to complainant, and that the said Leila Zimmern be required to surrender said deed and mark the same cancelled as of record in the office of the Judge of Probate of Mobile County, Alabama. Complainant further prays on the final hearing that the deed from defendant, Samuel Zimmern and his wife, Leila Zimmern, to Samuel Joseph Zimmern, Jr., Berenice L. Levinsohn and Janice Zimmern, dated January 26th, 1928, and described in Paragraph 9 of this Bill, be declared and held to be fraudulent, and that such deed be set aside, annulled, cancelled and held for naught, and declared void as to complainant, and that the said Samuel Joseph Zimmern, Jr., Berenice L. Levinsohn and Janice Zimmern be required to surrender said deed and mark the same cancelled as of record in the office of the Judge of Probate of Mobile County, Alabama.

Complainant further prays on final hearing of said cause that the said property transferred by the defendant to his wife and to his children as described in this bill be charged with a trust in favor of complainant in the sum of $53,-236.51, with interest from October 25, 1928.

Complainant further prays that said real estate and ap-
[fol. 12] purtenances hereinbefore described in this bill be sold under the orders of this court for the payment and discharge of the indebtedness due by the said Samuel Zimmern to complainant, and that such sale be held and conducted under such terms and conditions as may seem right, just and fit to the Court in the premises.

Complainant prays for such other, further, general or different relief to which it may be entitled in the premises.

Alex C. Birch, United States Attorney for the Southern District of Alabama, Attorney for Complainant.

NOTE.—The defendants and each of them are required to answer each and every averment and allegation of each and every paragraph of the foregoing bill of complaint; but answer under oath is hereby expressly waived.

Alex C. Birch, United States Attorney, Solicitor for Complainant.

[File endorsement omitted.]

[fol. 13] EXHIBIT "A" TO BILL OF COMPLAINT

Deed Book No. 218, N. S., Page No. 230

In consideration of the love and affection which I bear to my beloved wife, Leila Zimmern, nee Feist, and for other good and valuable considerations, the receipt of which is hereby acknowledged, I, the undersigned Samuel Zimmern, have sold and do hereby grant, bargain, sell and convey unto my said wife Leila Zimmern, my residence in the City of Mobile, Alabama, known as 1116 Government Street, formerly No. 972½ Government Street, together with the entire lot of land upon which it is situate, and adjacent thereto, being the same property which was conveyed to me by Dr. Seale Harris and wife by deed recorded in the office of the Probate Judge of Mobile County, Alabama, to which deed and the record thereof, for a particular description of said lot, reference is hereby made; Also all of the household furniture, fixtures, and personal property of

every nature and kind for household and home use contained in said residence.

To have and to hold the same unto her, her heirs and assigns forever.

In witness whereof, I have hereunto set my hand and my seal and have dated these presents Mobile, Alabama, January 25th, 1928.

Samuel Zimmern. (Seal.)

STATE OF ALABAMA,
Mobile County:

I, Clara M. Stokes, a Notary Public, in and for said State and County, hereby certify that Samuel Zimmern, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day, that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this 25th day of January, 1928.

Clara M. Stokes, Notary Public, Mobile County, Ala.

[fol. 14] EXHIBIT "B" TO BILL OF COMPLAINT

Deed Book No. 218, N. S., Page No. 236

Know all men by these presents, That for and in consideration of the natural love and affection which I, Samuel Zimmern, bear towards my children hereinafter set out, we, Samuel Zimmern and Leila Zimmern, his wife, have and do hereby grant, bargain, sell and convey unto Samuel Joseph Zimmern, Jr., Berenice Leila Levinsohn and Janice Zimmern, the following described real property situate in the City of Mobile, Alabama, viz:

That lot of land, with the improvements thereon, situate on the West side of Royal Street, second South of Saint Michael Street, having a front of about sixty-three (63) feet six (6) inches more or less on the West side of Royal Street, and running Westwardly about ninety-nine (99) feet, more or less for the depth of said lot of land; said lot of land being bounded on the North by property now or formerly of the Mobile Register and East by Royal Street, and said property being known as Numbers 55-57 and 59 North Royal Street.

Together with, All and Singular, the tenements, hereditaments, rights, members, privileges and appurtenances, thereunto belonging or in anywise appertaining.

To have and to hold, unto the said Samuel Joseph Zimmern, Jr., Berenice Leila Levinsohn and Janice Zimmern, their heirs and assigns forever.

In witness whereof, we have hereunto set our hands and seals this the 26th day of January, 1928.

Samuel Zimmern. (Seal.) Leila Zimmern. (Seal.)

STATE OF ALABAMA,
County of Mobile:

I, Stella Black, a Notary Public, in and for said State and County, hereby certify that Samuel Zimmern and Leila Zimmern, his wife, whose names are signed to the foregoing conveyance, and who are known to me, acknowledged before [fol. 15] me on this day that, being informed of the contents of the foregoing conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand, this the 26th day of January, 1928.

Stella Black, Notary Public, Mobile County, Alabama.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO BILL OF COMPLAINT—Filed June 24, 1931

Comes the plaintiff in the above described cause, with leave of court first had and obtained, and amends the original bill of complaint therein filed in the following manner and form:

1. By striking all that part of Paragraph 8 of said original bill beginning with the opening words of such paragraph and concluding with the words "and with intent to hinder, delay or defraud complainant, who at such time of said transfer was an existing creditor of the defendant, Samuel Zimmern".

2. By striking from Paragraph 11 of said original bill all that part beginning with the opening words thereof and con-

cluding with the words "and with intent to hinder, delay or defraud complainant, who at such time of said transfer was an existing creditor of the defendant, Samuel Zimmern."

Alex C. Birch, United States Attorney for the Southern District of Alabama, Attorney for Complainant.

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO AMEND COMPLAINT—Filed June 27, 1931

Now comes the Complainants, the United States of America, by their Attorney, Alex C. Birch, and moves the Court to be allowed to amend their bill of complaint. The same being considered by the Court;

It is ordered, adjudged and decreed by the Court that the complainants be, and they are allowed to amend their complaint.

Made this the 27th day of June, 1931.

Robert T. Ervin, U. S. District Judge.

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO BILL OF COMPLAINT—Filed June 30, 1931

Now come the defendants Samuel Zimmern individually and as guardian ad litem of Samuel Joseph Zimmern, Jr., Leila Zimmern, Berenice L. Levinsohn and Janice Zimmern, and answering the allegations of the bill of complaint as last amended in said cause, say:

1. Answering the first, second, and third paragraphs of said bill of complaint as last amended, these defendants admit the allegations therein alleged to be true.

2. Answering the fourth paragraph of said bill of complaint as last amended, the defendant Samuel Zimmern admits the allegations therein alleged to be true, but each of the other defendants say that they do not know whether said allegations are true or false, and they, therefore, deny the same and call for strict proof thereof.

3. Answering the fifth paragraph of said bill of complaint as last amended, the defendant Samuel Zimmern admits the allegations therein alleged to be true, but each of the other defendants say that they have no knowledge of the truth or falsity of the said allegations, and therefore, deny the same and call for strict proof thereof.

4. Answering the sixth paragraph of said bill of complaint as last amended, the defendants admit the allegations therein alleged to be true.

[fol. 19] 5. Answering the seventh paragraph of said bill of complaint as last amended, the defendants deny the allegations therein alleged. On the contrary, they say that said conveyance was executed by said Samuel Zimmern and accepted by said Leila Zimmern in full and absolute payment of a just debt which was then owing by the said Samuel Zimmern to the said Leila Zimmern, at a fair price and without any reservation of any benefit to the said Samuel Zimmern, and was a perfectly valid transaction wholly irrespective of the motives of the parties.

6. Answering the eighth paragraph of said bill of complaint as last amended, these defendants deny the allegations therein alleged.

7. Answering the ninth paragraph of said bill of complaint as last amended, these defendants say that it is true that the defendants, Samuel Joseph Zimmern, Jr., Berenice L. Levinsohn and Janice Zimmern are the children of Samuel Zimmern, and his wife, Leila Zimmern, and that Samuel Zimmern and his wife, Leila Zimmern, executed to the other defendants a deed of conveyance purporting to be described in the ninth paragraph of the said bill of complaint as last amended, and that the same was recorded as therein alleged.

8. Answering the tenth, eleventh and twelfth paragraphs of said bill of complaint as last amended, these defendants deny the allegations therein alleged.

Now having fully answered the bill of complaint as last amended, these defendants pray to be hence discharged with their reasonable costs in the premises incurred.

Harry T. Smith & Caffey, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO ANSWER—Filed Aug. 30, 1932

Now come the defendants, Samuel Joseph Zimmern, Jr., Leila Zimmern, Bernice L. Levinsohn and Janice Zimmern and by leave the Court first had amend their answer to the Bill of Complaint as last amended in this cause, in the following particulars, that is to say:

1. By amending the first sentence thereof so as to read as follows:

"Now come the defendants Leila Zimmern, Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern and answering the allegations of the bill of complaint as last amended in this cause, say:"

2. By amending the first paragraph of the said answer so as to read as follows, viz,:

"1. These defendants admit the allegations of the first and third paragraphs of the bill of complaint and that the allegations of the second paragraph were true at the time that this bill of complaint was filed, but they state that the defendants, Samuel Joseph Zimmern, Jr., Janice Zimmern, and Bernice L. Levinsohn have all since become of the age of twenty-one (21) years, otherwise the allegations of the second paragraph of the bill of complaint are true."

[fol. 21] 3. By amending the fifth paragraph of the said answer so as to read as follows, viz.:

"5. Answering the seventh paragraph of the said bill of complaint as last amended, these defendants deny each and all of the allegations therein set forth. On the con-

trary, they say, that each of the said conveyances by Samuel Zimmern was executed by the grantor and accepted by the grantees, for a full, adequate and valuable consideration, without any reservation of any benefit to the said Samuel Zimmern, and that they were each perfectly valid transfers, but these defendants further say that, at the time of the execution of each of said conveyances, said Samuel Zimmern owned and was in possession of and still owns and is in possession of a large amount of property in Mobile County, Alabama, within the jurisdiction of this Court, which was subject to execution or any other proper judicial proceedings for the enforcement of any debt that he might owe to the United States of America, and that each of the conveyances which are here attacked, is a perfectly valid conveyance from Samuel Zimmern to the respective grantees as between the parties, wholly irrespective of the truth or falsity of the allegations of said Bill of Complaint, and that, therefore, equity and justice require that the complainant, before proceeding to set aside the deeds described in this conveyance, so as to injure these *these* several defendants and to destroy their property rights unnecessarily, should first subject the said property owned by the said Samuel Zimmern and which is subject to execution and other judicial proceedings, and that it ought not to be permitted, in this Court of equity, to subject the property so conveyed to these defendants to the payment of the debts of Samuel Zimmern, so as to destroy the property rights of these defendants unnecessarily, at [fol. 22] least until it has exhausted its said remedy against the other properties of Samuel Zimmern in which no other person is interested, and these defendants insist that no final decree in this court should be rendered subjecting their said property to the payment of the debts of Samuel Zimmern until the United States of America has first exhausted its remedy against the property of the said Samuel Zimmern.

The said property above referred to, situate lying and being in the County of Mobile, State of Alabama, is more particularly described as follows:

A parcel of land situated on the South side of Madison Street commencing at a point one hundred and ten feet Eastward from the Southeast corner of Madison and St.

Emanuel Streets, and from said point running Eastwardly along the South side of Madison Street one hundred and nine feet to a point; thence running Southwardly and parallel with St. Emanuel Street, one hundred and fifty-six feet, more or less, to a point on the North line of lot eighteen in the St. Guiron Square which is bounded by Madison, Royal, Canal and St. Emanuel Streets, as per plat attached to deed from Moses Waring to Virginia P. Sims, of record in Deed Book 48, N. S. page 159, Mobile Probate Records; thence running Westwardly and parallel with Madison Street, along the North line of said lot eighteen to a point fifty-four feet, six inches from where the North line of lot eighteen is struck; thence running Southwardly and parallel with St. Emanuel Street, fifty-two feet, more or less, to a point at the Northeast corner of Lot Nineteen in said Square; thence running Westwardly and parallel with Madison Street, fifty-four feet, six inches to a point at the Southeast corner of a lot now or formerly the property of John J. Meyer; thence running Northwardly and parallel with St. Emanuel Street two hundred and eight feet more or less, to the point of beginning on the South side of Madison Street; being the [fol. 23] same property conveyed to the Stonewall Ice Company by Thos. W. Sims, as Executor of the Will of Virginia P. Sims, and individually, by deed of June 8th, 1894, of record in Deed Book 74, N. S., page 85 et seq. Mobile Probate Records, reference to which is hereby expressly made; and being the property on which the Stonewall Ice Company's plant is situated;

Also that other certain parcel of land commencing at a point on the West side of Royal Street, one hundred and fifty-four feet South of Madison Street, thence running Southwardly on the West line of Royal Street, one hundred feet to a point; thence Westwardly and parallel with Madison Street one hundred and sixty-four feet, six inches to a point; thence Northwardly and parallel with Royal Street one hundred feet to a point; thence Eastwardly one hundred and sixty-four feet, six inches to the point of beginning on the West line of Royal Street; being lots eighteen and nineteen of St. Guiron Square, as per plat aforesaid, and being the same property conveyed to the Stonewall Ice Company by Thos. W. Sims and Virginia P. Sims,

by deed of September 18th, 1902, of record in Deed Book 101, N. S., pages 134, et seq., Mobile Probate Records.

Also

Land on Section 35, Township 4, Range 2 West running at South West Corner of said section 35, running thence East along township line, between Township 4 South and 5 South, 1320 feet, then North parallel to west bound-ry line of said Section 35 a distance of 376½ feet, for a starting point, thence East and parallel to said township line 70 feet, to a point then East 364 feet, to a point on a line drawn parallel to said township line a distance North therefrom on an air line parallel to said western bound-ry line of said Section 429½ feet, then north and parallel to west bound-ry [fol. 24] line of said section 73 feet then east and parallel to said township line to point on a line parallel to west bound-ry line of said section a distance therefrom 1980 feet then North & parallel, to said western bound-ry line 132 feet, then east and parallel to said towns[illegible] 135 feet, then north to a point on the north line of Cottage Hill Road, and distance 69 feet along said North line from point where said North line intersects, a line parallel to west bound-ry line of said section and distance therefrom 1980 feet, then North and parallel to said West bound-ry to a point 2016 feet, north of said township line along said North bound-ry line of said section then west & parallel to said township line 660 feet, then south and parallel to said west bound-ry line to point of beginning and containing twenty two (22) acres and being in Section 35—Township 4 Range 2 west.

Barge Leila: An Iron Hull 212 feet length, 8 feet depth, 28 feet width actual cost to Samuel Zimmern, $32,000.00 with all machinery and boilers anchor etc.

Barge Janice: Wooden Barge 100 feet long 28 feet width, and 6 feet depth with machinery boilers etc. actual cost to Samuel Zimmern $10,000.00.

And this defendant, Leila Zimmern further shows unto the Court that at the time that Samuel Zimmern executed said deed to her, the said property on Government Street constituted his homestead, in which he had the right of exemption from execution or other process, and that this interest, which was so exempt to him, was included in said conveyance and that said conveyance, at least to this extent, was entirely valid, wholly irrespective of any question of consideration or any question of intent.

And this defendant further shows unto the Court that after said conveyance to her had been executed, she borrowed $10,000.00 from the First National Bank in Mobile, [fol. 25] Alabama, and secured said loan by a mortgage for $10,000.00 on said Government Street property which mortgage is still held by said Bank and which $10,000.00 was delivered to said Samuel Zimmern in part consideration of the conveyance which he had executed to her, and with the understanding that the same should be used by him in part payment of the indebtedness here sued upon, and that the said Samuel Zimmern did use said money and did pay the said $10,000.00 to the United States of America in part settlement of said indebtedness, so that the said property was not withheld from the payment of the complainant's demand, but, in fact and in truth, has been devoted thereto, and it would, therefore, be wholly unjust and inequitable to subject the said homestead to the further payment of said debt, and that even if it were equitable to do so in any event, it would not be equitable to subject this property to the payment of said debt, so as to leave this defendant liable to the First National Bank in Mobile, Alabama, for the $10,000.00 thus obtained for and paid to the United States of America. Even if this proceedings could be just in any event, it would not be just to subject any part of said property to the debt sued on until after the remedy of the United States of America against the property of the said Samuel Zimmern has been exhausted.

This defendant further shows unto the Court that in no event can the complainant be properly permitted to further prosecute this litigation until it has first made the First National Bank in Mobile, Alabama, who is thus interested in the said property, which is sought to be subjected a party to this litigation and given it an opportunity to be heard upon the issues involved; nor would it be equitable towards this defendant to subject the said property to the further payment of said Samuel Zimmern's liability to the First National Bank in Mobile, Alabama, without affording her proper protection against the liability which he has incurred in order to raise the $10,000.00 for the payment of this sum, which has already been paid to the complainant on account of the same indebtedness,

[fol. 26] And now come all of the defendants and further show unto the Court that on the 7th day of December, 1927,

the defendant Leila Zimmern delivered to Samuel Zimmern at his request, thirteen one thousand dollar French and Bolivia bonds then worth above par, for the purpose of enabling the said Samuel Zimmern to use the same as collateral security to a loan from the Merchants National Bank of Mobile, Alabama. These bonds were delivered by Leila Zimmern to Samuel Zimmern on December 7th, 1927, with the understanding that they, or their equivalent, would be returned to her within a reasonable time, but the bonds were pledged as collateral security to the Merchants National Bank of Mobile, Alabama, and were sold in order to satisfy said debt to the Merchants National Bank of Mobile, Alabama, and Samuel Zimmern was unable to carry out his agreement to return the same. These bonds, however, were not the property of Leila Zimmern, but were the property of her children, having been purchased by her and given to the children several years before, and said Leila Zimmern being distressed and anxious about the situation insisted that Samuel Zimmern convey to the defendants, other than Samuel Zimmern and herself, the Royal Street property in payment of Samuel Zimmern's indebtedness to the children arising out of said transaction and the said conveyance was executed in accordance with this understanding and these defendants insist that the said conveyance was valid under these circumstances, but if they are mistaken in this, then they nevertheless insist that said conveyance, having been made in payment of an honest debt they are entitled to have said conveyance stand as a security to them for the return of the value of said bonds with interest.

Harry T. Smith & Caffey, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO STRIKE, EXCEPTIONS AND DEMURRER TO ANSWER—Filed Jan. 24, 1934

Now comes the United States of America, complainant in the above described cause, and moves to strike and/or ex-

cepts to and/or demurs to the amended answer filed by the defendants, and separately and severally assigns as grounds for such motion, exceptions and demurrer, to the answer as an entirety, and to each paragraph thereof, the following grounds:

First. Because it affirmatively appears as a matter of law that no valid defense is set forth in such amended answer.

Second. Because the said separately alleged defenses contained in such answer are antagonistic.

Third. Because it does not appear from the averments of said answer that the property therein described is of sufficient value to discharge the debt due to complainant.

Fourth. Because under the averments of said answer it affirmatively appears that there is no duty incumbent on the complainant to exhaust remedies against other properties as a condition precedent to the subjection of property voluntarily conveyed.

Fifth. Because the complainant is unconcerned with any incumbrance placed by the defendants on property which was the subject matter of the original bill in which conveyances were sought to be set aside as being voluntary, as such alleged encumbrances were placed thereon after the filing of such original bill.

Sixth. Because under the averments of such amended answer the First National Bank of Mobile is not a proper party respondent.

[fol. 28] Seventh. Because it affirmatively appears that any rights the First National Bank of Mobile might have in the premises are subsequent to the rights of complainant.

Eighth. Because any conversion by Leila Zimmern, one of the respondents, of personal property described in last paragraph of the answer cannot militate against the interests of the complainant, and it affirmatively appears that the title to the Royal Street property was in the defendant Samuel Zimmern at the time of the conveyance thereof by him to his children, and because it affirmatively appears from the deed itself, which is a part of the original bill of complaint, that it was voluntary.

Ninth. Because the recitals of the deed to the Royal Street property cannot be varied by parol testimony in support of the allegations of fact contained in the concluding paragraph of the amended answer.

Alex C. Birch, United States Attorney, and J. E. Meredith, Assistant U. S. Attorney, Solicitors for Complainant.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF SUBMISSION—Filed Jan. 31, 1934

This cause comes on to be heard on the exceptions to the answer of the respondent, as amended August 30th, 1932.

The same being argued pro and con in open Court by Attorneys of Record, and being considered by the Court;

It is ordered, adjudged and decreed by the Court that the said exceptions be and the same are taken under submission.

This cause now comes on to be heard on the merits.

The same being argued pro and con in open Court by Attorneys of Record and being considered by the Court;

It is ordered and adjudged and decreed by the Court that the cause be, and the same is, taken under submission as to the merits.

Made this 31st day of January, A. D., 1934.

Robert T. Ervin, Judge.

[File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF ALABAMA

In Equity. No. 132

UNITED STATES OF AMERICA

vs.

SAMUEL ZIMMERN, LEILA ZIMMERN, SAMUEL JOSEPH ZIMMERN, JR., Bernice L. Levinsohn and Janice Zimmern

Statement of the Oral Evidence and Proceedings had in the Trial of the Above Styled Cause on the 31st Day of January, 1934, Before the Hon. R. T. Ervin, Judge—Filed Feb. 9, 1935

At the trial Hon. Alex C. Birch, United States Attorney, and Hon. J. E. Meredith, Assistant United States Attorney, appeared for the Plaintiff, and Messrs. Harry T. Smith and Samuel M. Johnston appeared for the Defendants.

OFFERS IN EVIDENCE

The Plaintiff introduced in evidence the income tax return of Samuel Zimmern, for the year 1920, showing that his tax was $17,192.23, said return being marked "Government Exhibit A".

Mr. Smith on behalf of Leila Zimmern, Samuel Joseph Zimmern, Jr., Mrs. Bernice L. Levinsohn and Janice Zimmern, objected to the introduction of this tax return on the ground "That it is nothing more than a declaration by Samuel Zimmern, which is not evidence against these grantees".

The Court overruled the objection and Mr. Smith reserved an exception.

The Plaintiff then offered in evidence the decision of the Board of Tax Appeals promulgated January 17th, 1928, and in connection therewith the appeal of Samuel Zimmern, of Mobile, Alabama, from the Board of Tax Appeals, the answer of the Government, the Petition of the tax payer, a copy of the letter of determination from the Board of Tax Appeals and statement of the income tax due, all cer-

tified to by the Chairman of the Board of Tax Appeals and the Clerk, in accordance with the Acts of Congress, marked "Government Exhibit B".

[fol. 31] Mr. Smith, on behalf of Leila Zimmern, Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern, objected to the evidence offered, first, upon the ground that they were not principals to this judicial proceedings, and the decision of the court is not therefore binding upon them; also upon the ground that the opinion of the Court has no binding effect on any one, but it is only the decree of the Court that has judicial effect in any instance against anybody.

The objection was overruled, and Mr. Smith reserved an exception.

Mr. Smith also objected to the introduction of these papers on the ground that the decree offered in evidence has been reversed by the Circuit Court of Appeals.

The Plaintiff then offered in evidence the "Bureau record copy of the certificate of over assessment, allowing $14,770.99, for 1920, in re Mr. Samuel Zimmern, Mobile, Alabama, duly certified to by the Treasury Department", marked "Government Exhibit C".

Mr. Smith also objected to this piece of evidence on behalf of Mrs. Samuel Zimmern, Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern, on the ground that "they are not parties to this proceeding, and the action therefore, is not evidence against them".

The Court overruled the objection and Mr. Smith reserved an exception.

The Plaintiff then offered in evidence the order of redetermination of the United States Board of Tax Appeals, dated May 27th, 1929, duly certified and marked "Government Exhibit D", which is in words and figures as follows, viz:

[fol. 32] GOVT. EXH. D. BAC

UNITED STATES BOARD OF TAX APPEALS

Docket No. 9951

SAMUEL ZIMMERN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

I, B. D. Gamble, Clerk of the United States Board of Tax Appeals, do hereby certify that Logan Morris whose

name is subscribed to the foregoing certificate was at the time of subscribing the same Chairman of the United States Board of Tax Appeals, duly commissioned and qualified and that full faith and credit are due to all his official acts as such.

In testimony whereof I have hereunto set my hand and affixed the seal of said Board at Washington, D. C., this 19th day of December, 1930.

B. D. Gamble, Clerk, United States Board of Tax Appeals. (Seal.)

UNITED STATES BOARD OF TAX APPEALS

Docket No. 9951

SAMUEL ZIMMERN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

I, Logan Morris, Chairman of the United States Board of Tax Appeals, the same being an independent agency in the executive branch of the Government, do hereby certify that B. D. Gamble is Clerk of said Board and was such Clerk at the time of making and subscribing to the foregoing certificate and that the attestation of said Clerk is in due form of law and by the proper officer.

[fol. 33] In testimony whereof I do hereby subscribe my name at Washington, D. C., this 19th day of December, 1930.

Logan Morris, Chairman United States Board of Tax Appeals. (Seal.)

UNITED STATES BOARD OF TAX APPEALS

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, B. D. Gamble, Clerk of the United States Board of Tax Appeals, hereby certify *that* the foregoing and attached to be true and correct copies of the Order of Redetermination in Docket No. 9951, wherein Samuel Zimmern is the Petitioner and Commissioner of Internal Revenue, is the Respondent.

In testimony whereof I hereunto subscribe my name and affix the seal of said Board at the City of Washington in said District this 19th day of December, 1930.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

United States Board of Tax Appeals, Filed Dec. 10, 1930

Dkt. ——. Cal. ——. Stat. ——.

UNITED STATES BOARD OF TAX APPEALS

Docket No. 9951

SAMUEL ZIMMERN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Order of Redetermination

This proceeding came on for hearing on May 16, 1929, upon motion of respondent for the modification of the Board's order of redetermination entered February 6, 1928, and for the entering of an order redetermining the de-
[fol. 34] ficiency in accordance with the decision of the United States Circuit Court of Appeals for the 5th Circuit, rendered on October 25, 1928, reversing the decision of the Board of January 17, 1928, under which said order of redetermination was entered.

Whereupon, both parties to the proceeding having appeared by counsel, and having agreed and stipulated that the correct amount of petitioner's tax liability for the calendar year 1920, as computed in accordance with the aforesaid decision and mandate of the United States Circuit Court of Appeals, is the sum of $70,428.84, and, upon consideration of all the records and files of this proceeding, such recomputation appearing to be correct, it is

Ordered, adjudged and determined that, for the calendar year 1920 the total tax assessed is the sum of $83,344.11, the correct tax liability the sum of $70,428.84 and accordingly an unpaid overassessment to be abated in the sum of $12,915.27, and that of the total tax liability the sum

of $17,192.33 has been paid leaving an unpaid tax liability for that year in the sum of $53,236.51.

(Signed) Benjamin H. Littleton, Chairman, U. S. Board of Tax Appeals.

Dated at Washington, D. C.
Enter: Entered May 27, 1929.

[fol. 35] An objection was made for Leila Zimmern, Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern, upon the same grounds as were interposed to the other evidence offered by the Government.

The Court overruled the objection.

The Government then offered in evidence the letter of determination with statement of income tax due from Samuel Zimmern dated August 12th, 1925, and marked "Government Exhibit E," which is in words and figures as follows, viz:

[fol. 36] GOVT. EXH. E

United States of America

Treasury Department,

Washington

September 26, 1929.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of copy of letter dated August 12, 1925, (with statement attached, minus Forms A and 882 mentioned therein), to Mr. Samuel Zimmern, Mobile, Alabama, from D. H. Blair, Commissioner, the originals of which are on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary,

F. A. Birgfeld, Chief Clerk, Treasury Department.
(Seal.)

Treasury Department,

Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue.

IT: PA:1:60D.
FJG: 102.

Aug. 12, 1925.

Mr. Samuel Zimmern, Mobile, Alabama.

SIR:

The determination of your income tax liability for the taxable years 1919 to 1921, inclusive, as set forth in office letter dated May 26, 1925, has been changed as a result of information submitted in conference held in this office June 3, 1925, to disclose a deficiency in tax amounting to $68,134.38, for the years 1919 and 1920, and an overassessment of $411.38 for the year 1921. The adjustments are explained in detail in the attached statement.

In accordance with the provisions of section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a tax paper has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

[fol. 37] If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:1:60D:FJG:102. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully, D. H. Blair, Commissioner, by
(Signed) J. G. Bright, Deputy Commissioner.

Inclosures: Statements. Agreements—Form A. Form 882.

art/ces-1.

Statement

IT:PA:1:6OD.
FJG:102.

Aug. 12, 1925.

In re Mr. Samuel Zimmern, Mobile, Alabama

Year	Deficiency in tax	Overassessment
1919	$440.17	(Waiver filed)
1920	67,624.21	
1921	.....	$411.38
Totals	68,134.38	$411.38

Reference is made to office letter of May 25, 1925, and to your letter of June 18, 1925, in which you submitted additional information on deductions claimed for the years 1919 to 1921, inclusive. A reaudit of your income tax returns filed for the years 1919 to 1921, inclusive, and the report of the Internal Revenue Agent in Charge, Nashville, Tennessee, has been made in connection with information submitted in conference.

A supplemental report of the Internal Revenue Agent, dated May 25, 1925, has been reviewed and approved as submitted, with the following exceptions:

1919

Depreciation allowed on barge "Janice" has been increased from $333.35 to $1,000.00 in accordance with information submitted in your letter of June 18, 1925.

1920

The deduction of $308.00 for taxes on the Alba property has been allowed in 1920 instead of 1921, in accordance with information in conference.

A deduction of $5,075.65, representing repairs on the All Property, has been allowed in accordance with information submitted in conference.

Depreciation allowed on barge "Janice" has been increased from $333.33 to $1,000.00 in accordance with information submitted in letter of June 18, 1925. The net income for this year has, therefore been reduced to $187,130.53.

[fol. 38] 1921

Net income for this year has been increased by $308.00, which represented taxes for 1920.

In accordance with the information submitted in conference of June 3, 1925, the depreciation on the Alba property for this year is $1,249.92. Inasmuch as $460.00 was previously allowed, a further deduction of $769.92, has been allowed.

The net income for this year has, therefore, been decreased to $8,542.99.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

The appeal referred to on page 1, refers only to the deficiency in tax, as the Revenue Act of 1924, does not provide for appeals on overassessments.

The overassessment shown herein will be made the subject of a Certificate of Overassessment, which will reach you in due course through the office of the Collector of Internal Revenue for your district. If the tax in question has not been paid, the amount will be abated by the Collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for another year or years, and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the overassessment does not indicate the amount which will be credited or refunded, since a portion may be an assessment which has been entered but not paid.

art/ces-1.
ART.
7/21/25.

STATEMENT RE GOV'T EXHIBITS "A", "B" AND "C"

By order of Court as shown in the record Exhibits "A", "B" and "C" are forwarded to the Circuit Court of Appeals, Fifth Circuit in their original form.

[fol. 39] The Government also offered in evidence the admissions in the answer as to the matters alleged in the bill.

The following evidence was then introduced on behalf of the defendants:

G. C. HIFNER, a witness for the defendants, after having been first duly sworn, testified that he was then the Auditor of the Merchants National Bank of Mobile, and that he was connected with that bank on December 7th, 1927, although at that time he was in the auditing department, though he was not in an official capacity.

He also testified that Mrs. Samuel Zimmern or Mrs. Leila Zimmern had a safety deposit box with the Merchants National Bank on December 7th, 1927, though it was in the name of Mrs. S. Zimmern.

The witness also testified that all box owners are required to sign a card before entering the box. The witness then had in his possession the card of Mrs. S. Zimmern showing the record on December 7, 1927.

The witness then testified that on December 7th, 1927, she went into her safety deposit box; that there is such an entry on her card, and that she signed it at that time. She went into her box on that day at 12:40 P. M. Mr. Johnston, for the defendants offered in evidence this card showing that Mrs. S. Zimmern entered the box on December 7th, 1927, at 12:40 P. M.

The witness then testified that he had the original liability sheet, also a transcript of assignments. This liability sheet shows some bonds put up as collateral, as security for some loan. This sheet shows that there was put up as security for the notes of the Zimmern Coal Company one entry of $2,000.00 French Government bonds; and another entry of $2,000.00 French Government bonds; a third entry showing $3,000.00 French Government bonds, another item of $3,000.00 Government French Republic bonds, $1,000.00 French Government bond, another item of $1,000.00 French Republic bond; another item shows ditto,—the same description. These bonds were deposited with the Merchants National Bank on December 7th, 1927.

The witness further testified that he could not say of his personal knowledge whether these bonds were subsequently sold by the Merchants National Bank or not, that he did not have the record with him showing the disposition of them.

[fol. 40] The witness then stated that the first item of the indebtedness of Zimmern Coal Company, is a $2,000.00 note secured by $2,000.00 worth of French Government bonds; the next item is a $2,000.00 note secured by $2,000.00 French Government bonds. The next item is a $3,000.00 note secured by a $3,000.00 French Government bonds; the next is also a $3,000.00 note secured by $3,000.00 worth of Government French Republic bonds. Then there are four items of $1,000.00 each secured by a $1,000.00 French Republic bond, except the last where there is no description. Altogether $13,000.00 worth of bonds were shown.

The witness also then stated that he did not have the dates of those notes, but the dates of payment were shown by a list that he had. The first note of $2,000.00 was paid on December 27th, 1927, no sale of the bond being shown. The next $2,000.00 note was paid on January 20th, 1928. At that time a payment of $4,000.00 was made, $2,000.00 of which was also applied on two notes of $1,000.00 each. The next payment was $3,000.00 made on February 6th, and the next payment was $3,000.00 likewise paid on February 6th. The next payment was made on February 24th, 1928. The total amount of those payments was $13,000.00.

The witness thought that the bank files would probably show a receipt or a return of broker's sale, in case any of the foregoing bonds were so handled.

H. C. Murnan, a witness for the defendants, after having been first duly sworn testified that he is in the dredging business and boat building business, that he has also had experience for a long period of time in building barges; that he has been in the ship building, barge business in Mobile since 1916, and that he has had occasion to value barges and to sell barges.

He also testified that Mr. Zimmern then had two barges at the witness' yard now, and that he has known these barges ever since he had been here, and that he knew them in 1927 and 1928.

The witness testified that the largest of these barges is a double-end iron hull that Mr. Zimmern converted into a coal carrier, with derricks on both ends of it with winches to load and unload the barge, but that he did not know the exact tonnage that it could carry. This barge is the Leila,

the witness did not remember exactly the length of this [fol. 41] barge, but it was about 200 feet long by about 38 feet wide by about 16 feet depth.

The witness knows the barge very well. The witness thought that $50,000.00 was a fair price for it during the years 1927, 1928, 1929 and 1930.

This barge had been laying up at the witness' plant for about four years. It is not a self-propelling barge but it has machinery on it for loading and unloading its own cargo. It is not in very good condition today; it has been laying there this length of time and no care taken of it.

The witness also knew Mr. Zimmern's barge Janice. It is a wooden hull barge used in bunkering coal, carrying its cargo on deck and loading it aboard ship—single boom and mast. The witness has known that barge ever since 1916. He repaired it for Mr. Zimmern a good many times.

The witness made an estimate of that barge at the same time he made an estimate on the iron barge, either for Mr. Zimmern or some other parties. He estimated its value at that time to have been $13,000.00 or $14,000.00. The witness thought that was a fair, reasonable market value of that barge at that time. Today it is sunk over there and practically worth very little money.

On cross examination the witness said that he had a $11,000.00 claim on the iron hull and he wished somebody would give that for the barge. The wooden barge is sunk and about half full of mud, and the chances are it will never be raised. It is worth nothing—it has been sunk for about three years.

The Leila is afloat, it is about one-third full of water, but the witness would not attempt to put a value on this barge today—there is no value today. The witness cannot sell anything he has, he cannot even give them away. The estimates that the witness made of the value of the two barges must have been in 1927 or 1928. Both barges were working when the witness made his estimate. At that time there was a market for them. About four years ago the bunkerage business in our river started down hill. Whenever business—floating equipment—when you haven't got any use for it, there is nobody buying it. It is more of a [fol. 42] liability than an asset. Since the depression, since

the crash, there has been practically no value for that equipment.

J. F. MAURY, the next witness for the defendants, after having been first duly sworn, testified that he is in the real estate business and that he has been in that business in Mobile, Alabama, for about 40 years. This witness testified that he knows the property on the south side of Madison street commencing at a point along the south side of Madison street and running from that point along the south side of Madison street 109 feet. There are two pieces of property,—one is on Madison street 100 feet front on the south side of Madison street, running back 109 feet, and another 100 feet on Royal street that adjoins this on the back.

The witness further testified that in 1928 and 1929 we had a speculative sales and actual demand for property. Now, as a speculative demand it was great, but the actual demand was of different value. Where a person needed it, and wanted a piece of property specifically for a purpose at that time, you could get a good price for it,—a better price than you could get just as a speculative price. Now the witness would say that the property ordinarily at that time would have been worth about $2,000.00, referring to the property on Madison street, if a person wanted that particular piece in connection with something on Royal Street it might have brought $4,000.00. The witness also stated that "in that period that that piece of property on Madison street would have sold for $2,000.00, but if anyone wanted it, and we did have quite a demand for property in that location for business purposes,—it would have probably brought $4,000.00. The other piece of property which had a frontage on Royal street, the witness would have said it would have brought $5,000.00,—well say $4,000.00 and for a specific purpose, it would have brought $6,000.00 where it was so that it could be connected up.

On cross examination this witness said that it was very hard to say what was the market value of the Madison street property. Witness said he could not sit here and tell you what the market value of that specific piece of property was when it was not on the market and when it was not for sale, but he was just stating as a general proposition [fol. 43] along that time and during that period, that that

property as a whole, you might say, was worth ordinarily about $6,000.00, and that if it had a specific purpose witness would have been glad to pay $10,000.00 for it as a whole.

LEILA ZIMMERN, one of the defendants, after having been first duly sworn as a witness in her own behalf, testified as follows: She is one of the defendants in this case. The other defendants, viz: Samuel Joseph Zimmern Jr., Bernice L. Levinsohn, and Janice Zimmern, are her children. In 1927 the witness had in her possession bonds belonging to her children. She had thirteen of these bonds, the face value of which was $1,000.00. These bonds were in her safety deposit box in the Merchants National Bank. The witness went to her safety deposit box in said bank on the 7th day of December 1927. The signature she identified as her signature, the one on the card that had just been referred to. The witness by refreshing her memory from this signature testified that she went to her bank on that day, viz: December 7th, 1927. When she went there on that day she got her thirteen bonds out of her safety deposit box.

The witness went to this box to get her bonds because Mr. Zimmern had a loan at the Merchants Bank called in and they gave him ten days to pay it. Mr. Zimmern was worried on account of this demand, he was afraid he would lose his Royal street property, and I told him not to wait ten days, that I had some bonds of the children and would let him have them to take up that note immediately and I went in my box and got these bonds and gave them to him on the same day. I gave them to him to give to Mr. Ladd, in the presence of Mr. Ladd. These bonds belonged to my three children. $11,000.00 of these bonds belonged to my single daughter, Janice Zimmern, one to my son, Samuel Joseph Zimmern, Jr., and one to my daughter, Mrs. Bernice L. Levinsohn. Mr Zimmern gave these bonds to Mr. Ernest Ladd with the notes attached. He gave them for his debt. I was right there when he turned them over to Mr. Ladd as security for that loan.

The witness testified that she had never gotten the bonds back.

(Here follow 2 photos, side folios 43a and 43b)

OFFER IN EVIDENCE

No. 2 Mobile, Ala., April 24th 193 0

Ninety-(90) days AFTER DATE, WITHOUT GRACE I PROMISE TO PAY TO THE ORDER OF

FIRST NATIONAL BANK OF MOBILE ALABAMA $ 10151.67

The Sum of $10151 and 67 Cts DOLLARS

SEAL OF FIRST NATIONAL BANK OF MOBILE, ALA.

Renewed Jul 24 1930

FOR VALUE RECEIVED, PAYABLE AT THE FIRST NATIONAL BANK IN MOBILE, ALABAMA.

MOBILE ALABAMA

THERE HAS BEEN DEPOSITED AND PLEDGED AS COLLATERAL SECURITY FOR THE PAYMENT OF THIS NOTE, OR ANY OTHER LIABILITY OR LIABILITIES OF THE UNDERSIGNED TO THE OWNER THEREOF, WHETHER THE SAME BE NOW EXISTING, OR HEREAFTER CONTRACTED, NOW DUE, OR HEREAFTER TO BECOME DUE, THE FOLLOWING PROPERTY, BELONGING TO THE UNDERSIGNED, TO-WIT:

(50) Fifty Shares of National City Bank Stock. Cert #C 115435

25 shares National City Bank Stock Cert #C 133689
pledged as additional collateral to-day 6/26/30

And full power and authority is hereby granted to sell, assign or deliver the whole or any part thereof, or any substitute therefor, or any addition thereto at public or private sale, at the option of the owner or holder of this note, his, their, or its assigns, on the non-performance of this promise, or non-payment of any of the liabilities above named, at any time or times thereafter, without advertisement or notice, which is hereby expressly waived, and at such sale the owner or holder of this note may purchase the whole or any part of said securities discharged from any right of redemption, or liability for conversion. In case of depreciation in the market value of the securities hereby pledged, or that may hereinafter be pledged for the payment of this note, or if from any cause whatever said securities pledged shall cease to be satisfactory collateral to the owner or holder of this note for this debt, its renewal or substitute, the undersigned hereby agrees to deposit additional security from time to time as demanded, and failing to deposit additional security to the satisfaction of the owner or holder hereof, this note shall become due and payable for all purposes, and a sale of the collateral pledged may be made immediately as provided for above. The owner or holder of this debt may buy any of said collateral at private sale, with or without notice at the market price, and if there is no market price, then at its value; and the proceeds of any such sales shall be applied first to the payment of the expenses of making such sale, together with a reasonable attorney's fee, if any attorney is employed, or consulted. Second, to the payment of the principal debt hereby secured and the interest thereon; third, to the payment of any other debt, which the undersigned may now or hereafter owe to the owner or holder of this note, either as principal, surety, endorser, or otherwise, and if any surplus remains the same shall be paid to the undersigned.

The parties to this instrument, whether maker, endorser, surety, or guarantor each for himself, hereby severally agrees to pay this note and waives as to this debt, all right of exemption under the constitution and laws of Alabama, or any other state, and they each severally agree to pay all costs of collecting, or securing, or attempting to collect or secure this note, including a reasonable attorney's fee, whether the same be collected or secured by suit or otherwise. And the maker, endorser, surety, or guarantor, of this note severally waives demand, presentment, protest, notice of protest, suit and all other requirements necessary to hold them.

(Sgd) Mrs. S. Zimmern

ATTEST: In evidence for Deft. B.A. C.

ADDRESS: No. 1116 Government Street.

Form 8—Pat.P.Co.

The undersigned endorsers each for himself, hereby severally agrees to pay this note and waives as to this debt all right of exemption under the Constitution and Laws of Alabama, or any other state and they each severally agree to pay all costs of collecting or securing, or attempting to collect or secure this note, including a reasonable attorney's fee, whether the same be collected or secured by suit or otherwise, and the said endorsers severally waive demand, presentment, protest, notice of protest, suit and all other requirements necessary to hold them.

_____

_____

_____

_____

_____

43b

[fol. 44] Mrs. Leila Zimmern also testified that she remembered an occasion when Mr. Zimmern agreed to pay $10,000.00 to the United States Government on account of his liability for taxes. She cannot exactly recall the date, but she did recall making the mortgage to the First National Bank. The witness and Mrs. Zimmern borrowed $10,000.00 from the First National Bank. The witness gave the First National Bank as security for the loan 50 shares of stock in the National City Bank of New York. They borrowed the money to pay the United States Government. That was the $10,000.00 that Mr. Zimmern paid to the United States Government on account of his tax. Then the National City Bank stock went down and the witness carried the bank 25 shares additional of the National City Bank stock. That stock kept going down and Mr. Bestor, President of the First National Bank called on the witness for more collateral so she mortgaged her home to the bank for that same indebtedness. At the time the witness gave that mortgage to further secure the debt, she gave a new mortgage and note and she got back the old note that she had given to the bank.

Thereupon Mr. Smith offered in evidence this note dated April 24th, 1930, which is a note of Mrs. Zimmern payable to the First National Bank secured by these 25 shares of National City Bank stock pledged as additional security.

The mortgage that the witness gave to the bank to secure that indebtedness of $10,000.00 has never been paid; it is still outstanding and the witness and Mr. Zimmern are still paying interest on it.. When the witness got that money, the $10,000.00 above referred to, she gave Mr. Zimmern a check payable to the Bank for New York exchange in the sum of $10,000.00 payable to W. E. Snead, Collector of Internal Revenue.

Mr. Smith offered in behalf of Mrs. Zimmern, said check in evidence, which is marked as an exhibit for the defendant, and is in words and figures as follows:

(Here follows 1 photo, side folio 45)

OFFER IN EVIDENCE

61-26

No.

FIRST NATIONAL BANK
MOBILE, ALABAMA

January 24th, 1930 192

PAY TO THE ORDER OF FOR NEW YORK EXCHANGE FAVG OF W. E. SNEAD, COLLECTOR OF INTERNAL REVENUE $ 10,000.00

TEN THOUSAND AND NO/100 ---------- Dollars

COUNTER CHECK

Mrs. D. Zimmerman
1116 Dorothy

45

[fol. 46] The note that the witness then gave the bank has been extended from time to time, and is still outstanding. The mortgage to the First National Bank was given by the witness on her home, which was the homestead in which she was then living and in which she is still living. She was living in that home for sometime prior to that transaction. The witness and Mr. Zimmern had owned that home for eighteen years. The title to the home was in Mr. Zimmern before he conveyed it to the witness. The homestead that witness refers to is on the North side of Government street and is known as 1116 Government street.

At the time that Mr. Zimmern conveyed this home to the witness, Mr. Zimmern owed the witness money. The witness had helped to buy the place and had loaned Mr. Zimmern quite a bit of money. She helped him to make the initial payment on it. When he conveyed the homestead to the witness it was her understanding that the conveyance was given in payment of the debt that Mr. Zimmern owed to the witness.

Thereupon the witness was asked the following question, viz: "In these conveyances that were made by your husband to your children I wish you would state whether or not there was any understanding between you and Mr. Zimmern that that conveyance was given in payment of his debt to the children".

Mr. Birch: "We object as incompetent, irrelevant, illegal and immaterial, and because it varies the terms of the voluntary deed".

The Court sustained the objection and Mr. Smith reserved an exception.

Thereupon the witness said that she had testified about having given her husband $13,000.00 worth of bonds. Then she was asked the following question, viz: "Is that the indebtedness that you say your husband agreed to convey the property to the children in payment of?"

Mr. Birch: "We make the same objection". The Court sustained the objection.

Then Mr. Smith asked "You are making the objections on the ground it is irrelevant, incompetent and immaterial, and not on the form of the question".

Mr. Birch replied: No technical objection—on the ground it is irrelevant and it tends to vary the terms of the deed".

[fol. 47] On cross examination Mrs. Zimmern testified

that she and Mr. Zimmern had been married 29 years. Janice Zimmern is 25 years old.

The witness could not say right off hand how much Mr. Zimmern owed her at the time he made the deed to her of the Government street property. The witness said, however, he had borrowed quite a bit from her, several thousand dollars. The money she loaned to Mr. Zimmern were the savings of a lifetime. She had saved it out of her allowance; she saved every birthday present, every anniversary present, and everything like that. When a ship was coaled witness always had to take Mr. Zimmern back and forth and she got her percentage, and she always saved it.

The witness had two safes at home, and she always had a safety deposit box. Some of the money she loaned Mr. Zimmern was kept at home and some in the safety deposit box. The witness thought that Mr. Smith had some cancelled checks showing the sum she had let Mr. Zimmern have at certain times. The witness did not remember the dates of these loans. She remembered one of $500.00 and another of $1,000.00. She would have to see the check, however, for the dates.

The witness was then asked "Didn't you tell us awhile ago that you let him have the money in your safety deposit box and at home?"

The witness answered "My bonds and things like that. As I would get enough, I would usually take it and get a bond. But my coupons that I clipped off that bond, I usually kept until I had enough to buy another bond." The witness also had a checking account in the First National Bank, which her checks will all show for it, and the checks are payable to Mr. Zimmern.

The witness testified that over a period of years she had approximately let Mr. Zimmern have about $20,000.00. She could not remember how many years, but she could remember her money. At that time she had let him have several thousand dollars, but she could not remember the date. She would have to see her checks to know the date. The witness could not say the amount, as a matter of fact, that [fol. 48] she let him have most of that money around 1920 to 1925. She could not remember.

Witness testified that they bought the Government street home 18 years ago. The witness let Mr. Zimmern have

some money to buy the house and when the house was painted she paid her percentage, and when we had a tile roof put on she helped pay for that. That was several years ago, she guessed, it was two or three years after they had been in the house. It formerly had a slate roof and it began to leak. She thought that this was two or three years after they had bought the house.

The witness did not know how long Mr. Zimmern had been in business in Mobile. He was in business before she knew him. When they purchased the Government street home Mr. Zimmern was in the coal business at that time, and she thought he was making money, he was doing a lovely business and she thought he was making money. During the world war from 1914 to 1918, Mr. Zimmern was very busy. The witness said that she did not let him have any money then, he did not need it then. He began to need money after this Government attachment. Then he lost his credit and lost out in business.

The witness testified that she would let him have money sometimes; before the income tax controversy she would have it and he did not, and he would always let the witness have money when she didn't have any.

The witness said she did not have the slightest idea how much money he was making during the war. Witness never went into her husband's business. Witness testified that she put $500.00 in the initial purchase of the home. She remembers that because it happened in New York at the McAlpine Hotel. The witness and Mr. Zimmern were taking dinner with Dr. Seale Harris from whom they bought the home. The witness gave the $500.00 to Mr. Zimmern, but the arrangements were made at the McAlpine Hotel in New York City. The witness carried it there to buy clothes for herself and children. She had seen the Harris home and was anxious for it, but Mr. Zimmern did not want to buy it and the witness told him that if he would go ahead and buy it she would give him this $500.00 on the initial payment. The witness did not know how much Mr. Zimmern put in. She could not tell right now what they paid for the [fol. 49] house, nor did she know how much the initial payment was. She let Mr. Zimmern attend to the business and she attended to the home end. The witness did not remember the date that he made this deed to her. She could not tell off hand what year he gave her the deed to the home.

The witness did not remember about Mr. Zimmern telling her that the Tax Appeal Board had decided his case against him. If the tax case worried him he did not tell the witness about it. He never mentioned to the witness that fact that he was in a controversy with the Government involving over $60,000.00 taxes that the people in Washington said he must pay.

The first time the witness found it out was in the paper, on the front sheet, when the Government had a suit against him and had attached this, that and the other. It did not specify any Royal street or Government street property, it specified everything he had and that was the first time the witness had ever heard of it.

The witness also testified that she did not make any statement or file any testimony in the income tax controversy at Washington. Neither did she make up any statements and give them to Mr. Boykin, nor did she give any statements to Mr. Rosson, of Rossin & Smith, or Mr. Smith, a member of that firm. Neither did she have any conference with Mr. Harry T. Smith about this income tax matter.

The witness also said that she did not remember asking Mr. Zimmern to give her a deed to the Government street house.

The occasion of Mr. Zimmern giving the witness a deed to the Government street house in January, 1928, was that he realized he owed the witness something,—he just told the witness he made her the deed. The witness did not previously know anything about it. He just said "He deeded the property to me—the homestead". That is absolutely all the witness could remember that he said and did. Mr. Zimmern just came home and said to the witness "I have deeded the home property to you," nothing else was said, and the witness replied "that she thought it was half hers anyway."

[fol. 50] Mrs. Zimmern continued, that there were thirteen bonds that she testified about, their denominations were $1,000.00. She did not remember the dates of these bonds, neither did she remember how many were French bonds. She did not think any were Peruvian bonds. She could not remember how many were Bolivian. She just remembered the number—there were thirteen. These bonds were not registered. They had been in the possession of the witness for a good many years, practically from the time they were

issued; that was a good many years ago, but the witness could not tell how long. None of the money of the witness had gone into the purchase of these bonds. The children's money went into the purchase of these bonds. The witness had saved all of the children's money. At the time each of them were born they each received $1,000.00. The money they received on their birthdays, and for high marks at school was saved. The witness also clipped the coupons on the bonds and kept the money, and when the witness got enough money she would buy another bond, but these bonds belonged to the children, they were not the bonds of the witness.

The witness also testified that her eldest daughter was married, and had gotten most of her bonds, and I figured the boy could always make his living. He had as many birthdays as the girls, but not as many high marks. He did not get as much money as the girls got. The married daughter had gotten her bonds when she was married, and the witness had very little of that daughter's left.

The witness furnished the money to buy all of those bonds for the children. She bought them with their accumulation of their money.

From the very beginning, when the children were born, each one got $1,000.00, and their grandparents and uncles gave them money, and the witness let Mr. Zimmern keep that in his business, until he was drafted in the war. He was called in the draft—he signed up with the Aviation Corps, and I told him he did not know what would happen and he had better give witness the children's money and he brought the witness home $10,000.00 worth of Liberty bonds, and the witness kept them for awhile until the foreign issues came out, and they paid so much nicer dividends I ex- [fol. 51] changed them. Some paid 7½ and 8%, and that is how it started. This money was kept in the business by Zimmern Coal Company until 1917, but the children did not need it and the witness and the children knew it was there and knew it was the chidren's any time they wanted it.

Mr. G. C. Hiffner, a witness for the defendants, on cross examination testified that the original liability sheet from which he was testifying on his direct examination reflects the loan account of the Zimmern Coal Company. The wit-

ness did not know who the officers of that company were. This statement is not a full statement of his loan account, but only for the period which he was subpoenaed for. It is sheet No. 3. There is a notation on this account that from February 8th, 1928, on, only Mr. Ladd was to handle it. The witness did not know anything about it then and was not familiar with it after that time.

This account indicated that the Zimmern Coal Company was the maker of the notes. The bonds were collateral for the notes. The liability sheet would indicate that the Zimmern Coal Company would have to have them to sign the note, but the witness was not familiar with whether any disclosure was made to the bank as to the ownership of those bonds.

The witness did not see those bonds and whether they were negotiable by bearer or the possessor would depend on whether they were coupon bonds or registered bonds. When registered bonds are taken on a loan, they are usually accompanied by a power of attorney. The witness did not know whether these bonds were registered or coupon. Probably the collateral receipt would indicate whether they were coupon or registered.

The witness located the collateral receipts and had them. He produced them and showed them to Mr. Birch. The bank records show that on the payment of those notes the bonds went back to the Zimmern Coal Company, except one, one bearing the signature of S. Zimmern and the records would indicate that it went back to S. Zimmern.

The records would indicate that these bonds were delivered, but the witness was not familiar with the transaction, only the records. The records would indicate that these notes were paid and the collateral returned either to Zimmern Coal Company or to Mr. Zimmern.

[fol. 52] Mr. Birch then offered these receipts in evidence, marked in evidence by the reporter as a Government Exhibit, being in words and figures as follows, viz:

(Here follow 3 photos, side folios 53, 54 and 55)

OFFER IN EVIDENCE

MERCHANTS NAT. BANK

COLLATERAL REGISTER

NO. 1628

Borrower ZIMMERN COAL CO.

Amount of Loan $ 3,000.00 12/10/27

Security Number	No. of Shares of Bonds	Description of Security	Par Value	Amount	Date Surrendered
M72385		GOVT. OF FRENCH REP. 20 YR. EXTERNAL GOLD LOAN 7½% DUE 6/1/41-COUPON JUNE 1928			
M23657		" "		1000.00	
M23658		" "		1000.00	
				1000.00	

CERTIFIED A TRUE COPY
Merchants National Bank
By G. C. Hughes
Auditor.

2/24/28

RECEIVED COLLATERAL DESCRIBED ABOVE
ZIMMERNS COAL CO. INC.
BY MRS. S. L. BELL

(SIGNED).

IN EVIDENCE
FOR GOVT.
BAC

MERCHANTS NATIONAL BANK

COLLATERAL REGISTER

NO. 1629

Borrower ZIMMERN COAL CO.

Amount of Loan $ 2,000.00 12/10/27

Security Number	No. of Shares of Bonds	Description of Security	Par Value	Amount	Date Surrendered
M15565		GOVT. OF THE FRENCH REP. 20 YR. EXTERNAL GOLD LOAN 8%-DUE 9/15/45-CPN-3/1/28			
M24808		" "		1000.00	
				1000.00	

CERTIFIED A TRUE COPY
Merchants National Bank
By G. C. Hughes
Auditor.

RECEIVED COLLATERAL DESCRIBED ABOVE
ZIMMERNS COAL CO. INC.
BY MRS. S. L. BELL

(SIGNED)

IN EVIDENCE
FOR GOVT.
BAC

53

444

MERCHANTS [redacted] BANK

COLLATERAL REGISTER NO. 1630

Borrower ZIMMERN COAL CO.

Amount of Loan $ 2,000.00 12/10/27

Security Number	No. of Shares of Bonds	Description of Security	Par Value	Amount	Date Surrendered
M15566		GOVT. OF THE FRENCH REP. 25 YR. EXTERNAL GOLD LOAN 8%-DUE 9/15/45-CPN 3/1/28		1000.00	
M59610		" " "		1000.00	

CERTIFIED A TRUE COPY
Merchants National Bank
By [signature]
Auditor

RECEIVED COLLATERAL DESCRIBED ABOVE

(SIGNED) ZIMMERN COAL CO. INC.
BY MRS. S. L. BELL

IN EVIDENCE
FOR GOVT.
BAC

MERCHANTS [redacted] BANK

COLLATERAL REGISTER NO. 1631

Borrower ZIMMERN COAL CO.

Amount of Loan $ 3,000.00 12/10/27

Security Number	No. of Shares of Bonds	Description of Security	Par Value	Amount	Date Surrendered
M23661		GOVT. OF THE FRENCH REP. 20 YR. EXTERNAL GOLD LOAN 7½%-DUE 6/1/41-CPN 6/1/28		1000.00	
M23660		" " "		1000.00	
M23659		" " "		1000.00	

CERTIFIED A TRUE COPY
Merchants National Bank
By [signature]
Auditor

2/24/28

RECEIVED COLLATERAL DESCRIBED ABOVE

(SIGNED) S. ZIMMERN

IN EVIDENCE
FOR GOVT.
BAC

54

4413

MERCHANTS NATIONAL BANK

COLLATERAL REGISTER NO. 1632

Borrower ZIMMERN COAL CO.

Amount of Loan $ 1,000.00 12/10/27

	Security Number	No. of Shares of Bonds	Description of Security	Par Value	Amount	Date Surrendered
	MT2386		GOVT. OF THE FRENCH REP. 20 YR. EXTERNAL GOLD LOAN 7½% DUE 6/1/41-CPN 6/1/28		1000.00	

CERTIFIED A TRUE COPY
Merchants National Bank
By [signature]
Auditor.

RECEIVED COLLATERAL DESCRIBED ABOVE
(SIGNED) ZIMMERN COAL CO. INC.
BY MRS. S. L. BELL

IN EVIDENCE FOR GOVT. BAC

MERCHANTS NATIONAL BANK

COLLATERAL REGISTER NO. 1634

Borrower ZIMMERN COAL CO.

Amount of Loan $ 1,000.00 12/10/27

	Security Number	No. of Shares of Bonds	Description of Security	Par Value	Amount	Date Surrendered
	MT2387		GOVT. OF THE FRENCH REP. 20 YR. EXTERNAL GOLD LOAN 7½% DUE 6/1/41-CPN 6/1/28		1000.00	

CERTIFIED A TRUE COPY
Merchants National Bank
By [signature]
Auditor

RECEIVED COLLATERAL DESCRIBED ABOVE
9(SIGNED) ZIMMERN COAL CO. INC.
BY MRS. S. L. BELL

IN EVIDENCE FOR GOVT. BAC

55

440

[fol. 56] SAMUEL ZIMMERN, one of the defendants, after first having been duly sworn, testified that the bonds described in the foregoing receipts were not all returned at one time. Mrs. Zimmern gave me one thousand dollar bonds, and as we sold the thousand dollar bond he would take up the collateral bond that was there and then would take the collateral bonds and sell them and take up the other collateral bonds until the entire thirteen thousand bonds were taken up, and of course I had one bond left over, which was $14,000.00. Mrs. Zimmern got, and we are claiming she gave me $13,000.00. The receipts show at the bank as the witness took them up and the people signed up for them as they reecived the bonds and I would go to Fenner & Bean, and John Clark and sell them quick for cash, and go over and take up some more bonds that were held over there as collateral. So that the $13,000.00 bonds that Mrs. Zimmern gave the witness were all exhausted in payment of the notes. The certificate that Mr. Hifner gave will show the dates that these bonds were taken up. His certificate will show you that.

Counsel for the Government admitted that Mr. Zimmern paid the Government with a certified check which shows that he paid $17,000.00, and also subsequently another payment of $10,000.00.

With reference to the $10,000.00 payment for which the First National Bank issued New York Exchange and which the witness gave to the Government on account of the compromise, was received by the witness under the following circumstances, viz: Mr. Harry Smith and the witness conferred on a settlement of the United States Government income tax. He also negotiated and offered $40,000.00 as a settlement of the claim that the Government is now making. After talking it over with Mr. Smith the witness agreed to offer the Government $40,000.00 as a compromise. It was necessary in order to show good faith that the $10,000.00 was paid. The witness did not have $10,000.00 and when Mr. Smith made that suggestion the witness went to his wife, Leila Zimmern, and asked her if she would be willing to let him have some assistance in paying off this Government debt. The witness went to Mr. Perrin Bestor, of the First [fol. 57] National Bank, and asked him how many shares of National City Bank stock would he accept as security to lend

$10,000.00 so the witness could make the first payment of good faith money to the Government. The market value of said National City Bank Stock on that day was $250.00 per share. Mr. Bestor said he would accept 50 shares. The witness asked Mrs. Zimmern to let him have the 50 shares of stock, if she wished to; that he wanted to pay off the Government indebtedness and get it cleared up.

Mrs. Zimmern went down to the First National Bank and gave her personal note with the 50 shares of City National stock in her name that she had enjoyed and owned a number of years, and gave it to Mr. Perrin Bestor as collateral for the loan of $10,000.00 in order to make the first payment to the Government on the offer of settlement.

During the intermission between the making of this offer and its acceptance by the Government, Mr. Bestor called upon the witness or his wife to give additional collateral. The 50 shares had gone down to such an extent that they were not sufficient collateral for the loan. Mrs. Zimmern had only 25 more shares of City National Bank stock and she gave that to the bank as additional collateral which makes 75 shares of City National stock, which the bank is holding today.

The home place had been deeded by the witness to Mrs. Zimmern for love and affection. The bank required additional collateral, and if the stock were to go where it originally was and the property were to go back to what it originally was, the bank would have nearly $70,000.00 worth of collateral for that $10,000.00 loan, right now. The witness asked for a delay of these cases hoping from time to time that the market would go up, so that the Government could be paid off and nobody would lose. But the depression is getting worse and worse and it has the witness in a vice, and the Government wants to push me now.

The witness then testified that the $10,000.00 which he paid the Government was the money which Mrs. Zimmern [fol. 58] borrowed from the First National Bank. The check was given to the witness payable by her and Mr. Harry Smith says it has to have the witness' own name on it, as the witness went down and deposited that check back in the bank and had it made payable to him and that is the money the Government got, $10,000.00 on that $40,000.00 settlement. The witness further testified that at the time he conveyed his home to Mrs. Zimmern the conveyance was

given for the money she had given to the witness from time to time and that he had gone to her a number of times, and she didn't even take it from him.

On cross examination the witness testified that most of the money with which his wife bought the National City Bank bonds came from the witness. The witness had been a big money-maker. He had represented the United States Steel Corporation for fourteen years and has sold hundreds and hundreds of thousands of dollars worth of coal. The witness made more money before 1919 than he ever made after that, or 1918, either, in 1920. The witness paid the Government $2000.00 too much. The witness said he paid so much income tax and paid so many people money that he did not know what to remember any more. He would say this, however, he had the English Government contract and all these contracts. He had made money, but the Government had put him out of business. He has not got a cent to his name today.

The witness said that when a man makes money he is liberal with his own family, especially a good woman like his wife. He has always been very liberal with her, and has given her from time to time, large sums of money, which the witness has invested for her. She gave the witness the money to buy the stock. The money he gave her stayed as a part of the operating capital of the Zimmern Coal Company, up until the time he was called in the army. She kept the records, and knew how much I owed her, and told him how much he owed her. She has these records.

At one time the Zimmern Coal Company was a corporation, and at one time it was the name under which witness did business individually. Witness does not remember when it ceased to be a corporation. When he deeded the Government street property to his wife, he owed her so much money that he cannot even tell today what it was. But he knew that she was true and he knew she had the [fol. 59] records correct, and it was a darn good sum of money. The amount that witness owed her was over $20,000.00 or $30,000.00.

The witness testified that Mrs. Zimmern let him have money whenever he asked her for it. Sometimes he would give her more than she let him have. She did not owe the witness anything, but he owed her. He owes her over $20,000.00 or $30,000.00; the witness guessed it was over $50,-

000.00. He didn't think he owed her practically $100,000.00, but it was between $30,000.00 and $40,000.00, the witness couldn't say definitely how much.

Whenever the witness gave birth to a child, he gave her money. When the child was born he gave her money, and she put it away.

The witness testified that his wife had given him money so many times. The witness used to make big money and she had a nice sum of money. The witness was not stingy with her, and didn't keep any records; she was so truthful the witness did not think it was necessary. Mr. Smith just showed the witness a check to pay to Rosson & Smith, who were auditing my books, and his wife gave him a $1,000.00 check to pay that bill.

Mr. Boykin had made a false report on the witness' account, and the Government had refuted the statement of Mr. Boykin, and Mr. Rosson or Mr. Smith went over to audit the books after Mr. Boykin made the statement, and that was to pay them off for the services rendered. That check, however, has nothing to do with the deed of witness to his wife, it was dated after the deed to his wife.

The witness further testified that he has no definite way of telling how much he owed his wife when he deeded the house to her, but he imagined that he owed her at least $20,000.00. Since the witness deeded her the home she let him have some $20,000.00 more. The witness did not remember the year he made the deed to his wife conveying to her the Government street home. The witness deeded the Government street home to his wife and his Royal street property to his children on the same day. The witness went to Mr. Joe McAleer to make up the deed to the house, and he went to Mr. Stallworth to make up the deed to the Royal street property. I just went to the lawyers and said make a deed out for love and affection. Mr. Stallworth made the [fol. 60] deed to the Government street house. The witness did not tell Mr. Stallworth or Mr. McAleer about the money he owed his wife. The witness did not know the date upon which the Board of Tax Appeals affirmed the Commissioner of Internal Revenue about this additional tax of some $50,000.00.

Witness testified that he did not know whether he lost his case with the Board of Tax Appeals before or after he deeded his property to his wife and children.

The witness was then asked "Don't you know as a matter of fact that as soon as you heard you had lost your case at the Board of Tax Appeals, you immediately went to Mr. Stallworth and asked him to write one deed and Mr. McAleer to write the other?" The witness did not know that as a matter of fact, and that was not the reason he deeded this property to his wife. The witness said he did not remember how many of those bonds were French and how many were Bolivian. The witness did not even remember the year that those bonds were acquired. The witness could not remember the dates of the transactions about the $13,000.00 worth of bonds. The witness then testified with respect to the market value of those bonds, that he sold one of them, and they all brought par when they were resold, or more when they were resold. The reason the witness sold those bonds was that he wanted those bonds. When a man makes a call loan on the witness and says he wants my bills paid, I borrowed as much as $300,000.00 on one load, and when I owed him a little $20,000.00 he called my loan and said he demanded me to pay in ten days. I wanted to get out of that bank and get my collateral and everything away from them just as quick as the witness could. That is the reason witness took them out and resold them to get out of there. Witness went over and told Mr. Perrin Bestor the whole story and he said "Mr. Zimmern we will allow you a credit of $10,000.00, and that credit was extended to me until the report was in the *the* paper by you or Mr. Snead and Mr. Bester withdrew that credit and that naturally killed my whole career as a business man.

The witness testified that prior to the execution of his deed to his wife, she gave him money for her pro rata, on the house. The house on Government street was bought on [fol. 61] the installment plan, so much down and so much a month, and she helped pay what she had. The witness was making a lot of money at that time, but not as much as he made later on. That is in 1924, 1925, 1926 and 1927. Before that the witness was not such a big man, then he bought his brother out, and had to pay him something like $20,000.00 to get him out of the business—Mr. Lee Zimmern, and he and his brother had jointly First National Bank stock, lots of stock of Mobile Electric Company, and

the witness had to sell them to pay his brother. The witness still owns some land at Cottage Hill.

The witness then testified that he owned some barges at the time he made the conveyance to the Government street home to his wife. One was a steel barge 212 feet long and had all kinds of hoisting derricks and steel masts and boilers and a cement flooring. That barge cost the witness around $65,000.00. At the time he made the conveyance to his wife and to his children this barge would have brought $32,000.00 at a forced sale. She was worth $50,000.00. The witness thought the market value of this barge was around $50,000.00. The market value of the wooden barge at that time was $13,000.00,—that would be a fair estimate.

The witness did not know what they are worth since the depression.

The witness testified that Miss Tilney offered him $500.00 an acre for his land at Cottage Hill. Witness also testified that he thought there was between 17½ and 22 acres in that piece of property. The reasonable market value of that land at the time of the conveyance was $500.00 an acre.

The witness also has some property on Royal street between Madison and Canal streets. In the opinion of the witness the fair market value of the Royal street property at the time of the conveyance to his wife and children was $10,000.00. The Royal street property is a big lot, but it is vacant.

In the witness' opinion the market value of the *of the* property on Madison street upon which there is a little house and a scale is worth from $6,000.00 to $8,000.00. The [fol. 62] witness did not know any market value for real estate; he had not been able to find any. He tried to get money on his property and was unable to do so.

On cross-examination the witness testified that his Cottage Hill property was unencumbered. The coal barges and the Madison street property, the Royal street property and the Cottage Hill property are not encumbered. They are all in the name of the witness. The only encumberance on this property is a lien of the Government on account of the witness' income tax.

Lodged in Clerk's office Jan. 22, 1935.
Virgil C. Griffin, Clerk, by Sarah G. Griffin, Chief Deputy Clerk.

[fol. 63] The above statement of the evidence seems to be correct.

J. E. Meredith, Assistant United States Attorney, Counsel for Complainant.

Done this 9th day of February, 1935.

ORDER APPROVING STATEMENT OF EVIDENCE

On this day came on for consideration the matter of approval of the statement of the evidence lodged by the appellant, and it appearing to the Court that the ten days notice of this hearing has been given to the appellee, as required by Equity Rule 75, and it further appearing that such statement is true, complete and properly prepared, it is ordered by the court that the same be and is hereby approved as part of the record herein, for the purpose of the respondent's appeal to the Circuit Court of Appeals for the Fifth Circuit.

Robert T. Ervin, United States District Judge.

Done this 9th day of February, 1935.

[File endorsement omitted.]

[fol. 64] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

In Equity. No. 132

UNITED STATES OF AMERICA

versus

SAMUEL ZIMMERN et al.

OPINION OF HON. ROBERT T. ERVIN—Filed March, 1, 1934

This is a bill filed by the United States to set aside two (2) conveyances of real estate in the city of Mobile made by the defendant, Zimmern. One of them being made to his three children on Jan. 26, 1928, which recited the consideration only of love and affection. The other was made to his wife. The conveyance to his wife was the homestead and was dated Jan. 25, 1928, and recited the consideration of love and affection and other good and valuable con-

siderations. The bill set up that Zimmern filed his income tax return for the year 1920 showing a sum of Seventeen Thousand One Hundred and Ninety-two Dollars and Thirty-three Cents, ($17,192.33) to be paid and later on in the same year the Commissioner of Internal Revenue directed a review of this return which resulted in the assessment of the deficiency for the year 1920, of Sixty-six Thousand One Hundred Fifty-one Dollars and Seventy-eight Cents, ($66,151.78). The tax payer prosecuted an appeal to the Board of Tax Appeals which on January 17, 1928, sustained the ruling of the Commission. An appeal was taken by Zimmern to the Circuit Court of Appeals on October 25, 1928; that court reversed the case, holding that the taxpayer was entitled to a credit of Fourteen Thousand Seven Hundred Seventy-six Dollars and Ninety-nine Cents, ($14,776.99) which had been denied him. The Board of Tax Appeals on May 27, 1929, fixed the amount of the unpaid tax liability at Fifty-three Thousand Two Hundred Thirty-six Dollars and Fifty-one Cents, ($53,236.51), after crediting the amount previously paid by him and the amount held by the Circuit Court of Appeals that he should have been credited with. The deed by Zimmern to his wife of the homestead was dated January 25, 1928, and the deed to the children bore date January 26, 1928. It appears, therefore, that [fol. 65] the indebtedness of Zimmern for his income tax antedated both conveyances. As to the deed to the children it is contended that Zimmern borrowed from his children some Thirteen Thousand Dollars, ($13,000.00) in French Bonds which were in his wife's safety deposit box in the Merchants National Bank. And as to the deed to his wife it is contended that she had loaned Zimmern various sums, at different times, aggregating from Twenty to Fifty Thousand Dollars. And that the deed was intended to repay her these advances. It is further contended that Zimmern at the time of the fixing of the amount of his deficiency tax, had other properties which might have been subjected to the payment of his debt had the government levied on them. These assets consisted of two (2) barges which were valued by H. C. Murnan for the years '27, '28, '29, '30 at about Fifty Thousand Dollars, ($50,000), but Murnan testified were worth nothing now. There was testimony of the lot that Zimmern owned in the City of Mobile, which was worth possibly Six Thousand Dollars, ($6,000.00) provided a purchaser could be found who

wanted the property. Mrs. Zimmern testified that on December 7, 1927, she wtihdrew from her safety deposit box the foreign bonds of her children and turned them over to her husband, to be deposited with the Merchants National Bank as security for a loan of about Ten Thousand Dollars, ($10,000) they had made Mr. Zimmern. She testified,

"Mr. Ladd called in the loan, and told him he would give him ten days to pay and Mr. Zimmern was worried—he was afraid he would lose his Royal Street Property."

Now, if Zimmern's barges and property, other than the two pieces involved in this suit were worth Fifty-six (56) or Sixty (60) Thousand Dollars at that time I could not see any reason for him to be worried. Again, if his property was, at that time, worth the sum he contends it was worth, and this was December, 1927, there would have been no reason for The Merchants National Bank to call its loan and give him only ten days in which to adjust it. The Royal Street property which he refers to is the piece of property which was conveyed to the children. There was a [fol. 66] compromise of this Fifty-three Thousand Dollars ($53,000) indebtedness agreed upon, and under the terms of the compromise Ten Thousand Dollars ($10,000) was paid to the government. Then Zimmern fell down in the further payments. It appears that this Ten Thousand Dollars, ($10,000) was borrowed from the First National Bank of Mobile and a mortgage was given on the homestead by Mrs. Zimmern as additional security to the First National Bank for the loan tho the bank then had Seventy-five shares of stock of the National City Bank of New York. Zimmern testifies that this stock was worth when deposited with the First National Bank Two Hundred Fifty Dollars, (-250) a share. It is contended the court cannot proceed in this case because the First National Bank is not made a party. The mortgage to the Bank was made after this bill was filed. I do not, therefore, see why they are necessary parties. After considering all the evidence, I am of the opinion that the prayer of the bill should be granted. A decree will therefore be entered setting aside both conveyances.

Robert T. Ervin, Judge.

Date March 1, 1924.

[File endorsement omitted.]

[fol. 67] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

In Equity. No. 132

UNITED STATES OF AMERICA, Complainant,

vs.

SAMUEL ZIMMERN, LEILA ZIMMERN, SAMUEL JOSEPH ZIMMERN, JR., BERNICE L. LEVINSOHN and JANICE ZIMMERN, Defendants

FINAL DECREE—Filed March 3, 1934

This matter coming on to be heard on the pleadings and on the merits, and the cause being submitted to the court on the pleadings and on the documentary evidence offered by the complainant, and admissions in the answers of the several respondents, and on the oral testimony offered by the respondents, and having been orally argued with submission of briefs, and after being considered and understood by the court, the court finds that the complainant is entitled to relief in the premises.

It is, therefore, by the court ordered, adjudged and decreed as follows:

1. That the respondent, Samuel Zimmern, is indebted to the United States of America for income taxes for the calendar year of 1920 in the sum of $53,236.51, with interest at the rate of 6% from the 27th day of May, 1929, until January 25th, 1930, at which time the respondent paid to the complainant the sum of $10,000.00, which is to be allowed as a credit on the tax indebtedness; and at the rate of 6% interest on the sum of $43,236.51 from the 25th day of January, 1930, until the date of this decree, aggregating the sum of $55,984.36, for which latter sum judgment is entered.

2. It is by the court further ordered, adjudged and decreed that the deed executed by the respondent Samuel Zimmern to respondent Leila Zimmern on the 25th day of January, 1928, and which is found recorded in Deed Book No. 218, N. S., at page 230, in the office of the Judge of Pro-
[fol. 68] bate of Mobile County, Alabama, and which conveyed to the respondent, Leila Zimmern, the residence of

the said Samuel Zimmern, known as 1116 Government Street, and formerly known as 972½ Government Street, and being the same property which was conveyed by Dr. Seale Harris and wife to respondent Zimmern by deed recorded in the office of the Probate Judge of Mobile County, Alabama, and which deed and record reference is made for a more particular description of said real estate and property, be and the same is hereby set aside, annulled, cancelled and held for naught and declared void.

It is further ordered that the grantee in said deed, the respondent, Leila Zimmern, be and she is hereby required to surrender said deed and to mark on the marginal record thereof in the office of the Probate Judge of Mobile County, Alabama, that said deed has been cancelled and surrendered.

3. It is further ordered, adjudged and decreed that the deed executed by Samuel Zimmern and his wife, Leila Zimmern, on the 26th day of January, 1928, to Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern, and which is found of record in Deed Book No. 218 N. S., at page 236, in the office of the Judge of Probate of Mobile County, Alabama, and which conveys to the grantees mentioned in said deed the following described property:

That lot of land with the improvements thereon situated on the West side of Royal Street, Second South of St. Michael Street, having a front of about 63 feet, 6 inches, more or less, on the West side of Royal Street, and running westwardly about 99 feet more or less of the depth of said lot of land; said lot of land being bounded on the North by a property now or formerly of the Mobile Register and East by Royal Street, the said property being known as Nos. 55, 57 and 59 North Royal Street, and all of which is in the City and County of Mobile,

be and the same is set aside, annulled, cancelled and held for naught and declared to be void.

It is further ordered that the grantees in said deed, Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern, be and they are hereby required to surrender said deed and to mark on the marginal record thereof in the office of the Probate Judge of Mobile County, Alabama, that said deed has been cancelled and surrendered.

[fol. 69] 4. It is further ordered, adjudged and decreed that the two above described parcels of land, to-wit, that parcel known as 1116 Government Street, in the city of Mobile, Alabama, and that parcel known as 55-57 and 59 North Royal Street, in the city of Mobile, Alabama, and which are more particularly described in the preceding paragraphs of this decree, be sold by the United States Marshal of the United States District Court for the Southern District of Alabama, to the highest, last and best bidder for cash, at public outcry, at the Government Street entrance of the Court House of Mobile County, in the city of Mobile, Alabama, after advertising such sale for six consecutive weeks in a newspaper of general circulation in the city of Mobile, Alabama, and such property is to be sold separately, such separate sales to be subject to confirmation by this court.

5. It is further ordered, adjudged and decreed that out of the proceeds of the sale of the property known as 1116 Government Street, and which is the homestead of the respondents, Samuel Zimmern and Leila Zimmern, his wife, the sum of $2,000.00 be carved and be paid to Leila Zimmern, the wife and grantee in the deed from her husband to her, heretofore particularly described in a preceding paragraph of this bill, and which deed has been set aside and held void, and that such sum be in lieu of homestead exemptions allowed under the laws of the State of Alabama.

6. It is further ordered, adjudged and decreed that a trust be declared and fixed on the proceeds of the sale of the properties described in this decree, in favor of the complainant in the sum of $55,984.36, which trust is subject to a prior claim and trust which is declared in favor of the respondent Leila Zimmern in the specific proceeds of the sale of the homestead property, in the sum of $2,000.00, as homestead exemption.

7. It is further ordered, adjudged and decreed that in the event the proceeds of the sale of the properties described in this decree after deducting the homestead ex-[fol. 70] emption of $2,000.00 hereinabove declared on the proceeds of the sale of the homestead property are insufficient to satisfy the judgment rendered in favor of the complainant, in the sum of $55,984.36, that execution issue

against any other property, real, personal or mixed, belonging to the respondent, Samuel Zimmern.

8. It is further ordered, adjudged and decreed that if the said Leila Zimmern and the said Samuel Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern fail or refuse to mark on the marginal records of the above described deeds in the office of the Probate Judge of Mobile County, Alabama, that said deeds have been cancelled, as ordered in paragraphs 2 and 3 of this decree, that the Clerk of this Court do, and he is hereby ordered to, mark on said marginal records of such deeds in the office of the said Probate Judge, that said deeds have been cancelled.

It is further ordered, adjudged and decreed that the respondent, Samuel Zimmern, be taxed with the costs of this case.

Done at Mobile, Alabama, in chambers, on this 3rd day of March, 1934.

Robert T. Ervin, United States District Judge.

[File endorsement omitted.]

[fol. 71] In United States District Court

[Title omitted]

Order Extending Term of Court—Filed May 11, 1934

It appearing to the Court that a decree was entered in this cause on March 3rd, 1934 and for good reason shown it will be necessary to modify or amend said decree.

It is, therefore, ordered and adjudged by the Court that the November Term of this Court which expires on the 28th day of May, 1934 be, and the same is, extended for ninety (90) days from that date, in which time all matters and orders in connection with this cause and the amendments of the decree may be entered.

Done this 11th day of May, A. D., 1934.

Robert T. Ervin, Judge.

[File endorsement omitted.]

[fol. 72] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED PETITION OF DEFENDANT FOR REHEARING—Filed Aug. 11, 1934

To the Honorable Robert T. Ervin, Judge of the United States District Court for the Southern District of Alabama:

1

Defendant Samuel Zimmern was taken by surprise on the trial of said action because Mr. Samuel Johnston averred that he did not represent Mr. Zimmern, but only the grantees, defendant Zimmern alleges that evidence can be brought forth that Mr. Johnston was to represent him as well, that Mr. H. T. Smith was to represent the grantees, consequently being without the aid of counsel, he was not able to present his defense in a proper manner, and such occurrence could not have been guarded against by reasonable diligence.

2

The decision is not sustained by the great preponderance of evidence and which shows that the transfers were not made with intent to defraud, in that there was consideration for the transfers, and that at the time the transfers were made on January 25th, 1928, and January 26th, 1928, respectively, petitioner had no knowledge that the Board of Tax Appeals had entered a decision against him on January 17th, 1928, evidence to sustain this letter will be entered upon the hearing.

[fol. 73] 3

The decision is contrary to the evidence which shows that the transfers were not made with intent to defraud, and that at the time the transfers were made petitioner had property other than that transferred in an amount sufficient to satisfy the assessment.

4

The decision is contrary to the evidence which shows that the transfer of the homestead was made not with intent to

defraud, but that it was made for good and valuable considerations; as well as love and affection, such valuable considerations being monies given to petitioner by grantee from time to time over a course of years.

5

The court was manifestly in error in alleging, as appears from its written opinion, upon which it rested its final decision, "Now if Zimmern's barges and property, other than the two pieces involved in this suit were worth (36) or (60) thousand dollars at that time I could not see any reason for him to be worried. Again, if his property was, at that time, worth the sum he contends it was worth, and this was December 1927, there would have been no reason for The Merchants National Bank to call its loan and give him only ten days in which to adjust it." which infers that because Zimmern was worried over his financial condition his barges must not have — worth much then, or not sufficient in value to pay the Merchants National Bank the amount he owed which was approximately $20,000.00, evidence is available and will be produced upon this hearing to the effect that to-day, after several years of depreciation, one parcel of the property, to wit: the barge "Leila," is sought by parties who intimate that they would pay about $15,000. if it meets their requirements.

6

That the court proceeded to a decision, after holding the matter open, in not hearing the testimony of Mr. Ladd of The Merchants National Bank, who was a material witness, and whose testimony would have obviated the court in [fol. 74] reaching the erroneous conclusion that "there would have been no reason for the Merchants Bank to call its loan and give him only ten days in which to adjust it," which is an inference that the reason the bank called the loan was that his property other than the parcels transferred were not of sufficient value to substantiate the amount the bank had loaned him, petitioner avers that it can be shown that the reason for Mr. Ladd calling the loan was that petitioner had been buying stocks and bonds from places other than from his bank, and that petitioner's business was unprofitable to the bank as he did not carry a

sufficient balance there, and for that reason the loan was called.

The Court has overlooked the established maxim of equity jurisprudence that he who seeks the aid of a court of equity must do equity.

The foregoing are some of the errors into which the Court has been led in its consideration of the record. Not only will these errors be plainly apparent upon a further consideration of the record, but a full review of it will show that the facts as they actually existed afford no basis for any such application as that made by the Court.

Petitioner prays, for the reasons herein set forth, that the decree of the Court be vacated, and the cause reheard and reconsidered.

Respectfully submitted by Norman H. Rattner, Counsel for Petitioner.

I hereby certify that the foregoing petition is, in my opinion, well founded in law and should be granted, and is not interposed for delay.

Norman H. Rattner, Counsel for Petitioner.

Subscribed and sworn to before me on this 10th day of August, 1934. William M. Bekurs, Notary Public, Mobile County, Alabama. (Seal.)

[File endorsement omitted.]

[fol. 75] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AMENDING FINAL DECREE—Filed Aug. 13, 1934.

This matter coming on to be further heard on motion of respondents for a rehearing of the decree entered on the 3rd day of March, 1934, and being submitted on such motion and having been argued in open court and it appearing to the court that the lands mentioned and described and ordered to be sold in said final decree of March 3rd, 1934, should be sold subject to any dower rights of the respondent Leila Zimmern;

It is therefore by the Court ordered, adjudged and decreed that the decree entered by the Court in this cause on March 3rd, 1934, be, and the same is hereby amended so as to add immediately after paragraph 8 of the following:

9. "It is further ordered and decreed that the lands and appurtenances thereto mentioned and described and ordered to be sold by this decree be sold subject to any dower rights of the respondent Leila Zimmern."

It is further ordered and decreed by the Court that as to all other matters and on all further grounds the said motion for rehearing is denied.

Done at Mobile, Alabama, this 13th day of August, 1934.

Robert T. Ervin, United States District Judge.

[File endorsement omitted.]

[fol. 76] In United States District Court

[Title omitted]

Petition of Samuel Zimmern for Appeal—Filed Nov. 10, 1934

To the Honorable Robert T. Ervin, District Judge:

The above named Samuel Zimmern, feeling aggrieved by the decree rendered and entered in the above entitled cause upon towit, the 3rd day of March, 1934, and the amendment thereof rendered on the 13th day of August, 1934, in response to a motion for a rehearing duly filed in said Court, and which motion in its remaining aspects was overruled upon to-wit the 13th day of August, 1934, does hereby appeal from said decree to the Circuit Court of Appeals for the Fifth Judicial Circuit, for the reasons set forth in the assignment of Errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that the transcript of the record, proceedings and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Fifth Judicial Circuit under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of him be made.

Norman H. Rattner, Attorney for Petitioner.

[File endorsement omitted:]

[fol. 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Nov. 10, 1934

Now comes Samuel Zimmern, one of the defendants in the above entitled cause, and files the following assignments of errors, upon which he will rely upon his prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court, upon to-wit, the 3rd day of March 1934, and the

I

That the United States District Court for the Southern Division of the Southern District of Alabama, erred in rendering that portion of said decree which applies to this appellant, viz: It is by the Court further ordered, adjudged and decreed that the deed executed by the Respondent Samuel Zimmern to the Respondent Leila Zimmern on the 25th day of January, 1928, and which is on record in Deed Book No. 218 N/S. at page 230 in the office of the Judge of Probate of Mobile County, Alabama, and which conveyed to the respondent Leila Zimmern the residence of the said Samuel Zimmern known as 1116 Government Street, and formerly known as 972½ Government, and being the same property which was conveyed by Dr. Seale Harris and wife to Respondent Zimmern by deed recorded in the office of the Probate Judge of Mobile County, Alabama, and to which deed and record reference is made for a more particular description of said real estate and property, be, and the same is hereby set aside, annulled, cancelled and held for naught, and declared void.

It is further ordered that the grantee in said deed, Respondent, Leila Zimmern, be, and she is hereby required to [fol. 78] surrender said deed, and to mark on the marginal record thereof in the office of the Probate Judge of Mobile

County, Alabama, that said deed has been cancelled and surrendered.

II

That the United States District Court for the Southern Division of the Southern District of Alabama, erred in rendering that portion of said decree which applies to these appellants, viz:

3. It is further ordered, adjudged and decreed that the deed executed by Samuel Zimmern and his wife Leila Zimmern, on the 26th day of January, 1928, to Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern, and which is found of record in Deed Book 218 N. S. page 236, in the office of the Judge of Probate of Mobile County, Alabama, and which conveys to the grantees mentioned in said deed the following described property

That lot of land with the improvements thereon situated on the west side of Royal Street, second South of St. Michael Street, having a front of about 63 feet, 6 inches, more or less, on the west side of Royal Street, and running westwardly about 99 feet more or less of the depth of said lot of land, said lot of land being bounded on the north by a property now or formerly of the Mobile Register and East by Royal Street, said property being known as Nos. 55, 57 and 59 North Royal Street, and all of which is in the city and county of Mobile.

be and the same is set aside, annulled, cancelled and held for naught and declared to be void.

It is further ordered that the grantees in said deed, Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern, be and they are hereby required to surrender said deed and to mark on the marginal record thereof in the office of the Probate Judge of Mobile County, Alabama, that said deed has been cancelled and surrendered.

III

That the United States District Court for the Southern Division of the Southern District of Alabama, erred in rendering that portion of said decree insofar as it applied to the lands and property hereinabove described, which is as follows, viz:

[fol. 79] 4. It is further ordered, adjudged and decreed that the two above described parcels of land, to-wit: That parcel known as 1116 Government street, in the City of Mobile, Alabama, and that parcel known as 55, 57 and 59 North Royal street in the City of Mobile, Alabama, and which are more particularly described in the preceding paragraph of this decree, be sold by the United States Marshale of the United States District Court for the Southern District of Alabama, to the highest, last and best bidder, for cash, at public outcry at the Government street entrance of the Court House of Mobile County, in the City of Mobile, Alabama, after advertising such sale for six consecutive weeks in a newspaper of general circulation of the City of Mobile, Alabama, said property is to be sold separately, said separate sales to be subject to confirmation by this court.

III

That the United States District Court for the Southern Division of the Southern District of Alabama, erred in rendering the following portion of said decree insofar as it applies to this appellant, viz:

8. It is further ordered, adjudged and decreed that if the said Leila Zimmern, the said Samuel Zimmern, Jr., Bernice L. Levinson and Janice Zimmern fail or refuse to mark on the marginal record of the above described deeds in the office of the Probate Judge of Mobile County, Alabama, that said deeds have been cancelled as ordered in paragraphs 2 and 3 of this decree, that the clerk of this court do, and he is hereby ordered to mark on said marginal records of such deeds in the office of said Probate Judge that said deeds have been cancelled.

Wherefore the Appellant prays that said decree be reversed and that said District Court for the Southern Division of the Southern District of Alabama, be ordered to enter a decree reversing the decision of the lower Court in said cause insofar as it applies to this Appellant as hereinabove set forth.

Norman H. Rattner, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF LEILA ZIMMERN FOR APPEAL—Filed Nov. 10, 1934

To the Honorable Robert T. Ervin, District Judge:

The above named Leila Zimmern, feeling aggrieved by the decree rendered and entered in the above entitled cause upon to-wit, the 3rd day of March, 1934, and the amendment thereof rendered on the 13th day of August, 1934, in response to a motion for a rehearing duly filed in said Court, and which motion in its remaining aspects was overruled upon to-wit, the 13th day of August, 1934, does hereby appeal from said decree to the Circuit Court of Appeals for the Fifth Judicial Circuit, for the reasons set forth in the assignment of Errors filed herewith, and she prays that her appeal be allowed and that citation be issued as provided by law, and that the transcript of the record, proceedings and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Fifth Judicial Circuit under the rules of such Court in such cases made and provided.

And your Petitioner further prays that the proper order relating to the security to be required of her be made.

Norman H. Rattner, Attorney for Petitioner.

[File endorsement omitted.]

[fol. 81] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERRORS—Filed Nov. 10, 1934

Now comes Leila Zimmern, one of the defendants in the above entitled cause, and files the following assignments of errors, upon which she will rely upon her prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court, upon to-wit, the 3rd day of March, 1934.

I

That the United States District Court for the Southern Division of the Southern District of Alabama, erred in rendering that portion of said decree which applies to this appellant, viz: It is by the Court further ordered, adjudged and decreed and that the deed executed by the Respondent, Samuel Zimmern to the Respondent Leila Zimmern on the 25th day of January, 1928, and which is on record in Deed Book No. 218 N. S. at page 230 in the office of the Judge of Probate of Mobile County, Alabama, and which conveyed to the Respondent Leila Zimmern the residence of the said Samuel Zimmern known as 1116 Government Street, and formerly known as 972½ Government, and *and* being the same property which was conveyed by Dr. Seale Harris and wife to Respondent Zimmern by deed recorded in the office of the Probate Judge of Mobile County, Alabama, and to which deed and record reference is made for a more particular description of said real estate and property, be, and the same is hereby set aside, annulled, cancelled and hel*f* for naught, and declared void.
[fol. 82]. It is further ordered that the grantee in said deed, Respondent, Leila Zimmern, be, and she is hereby required to surrender said deed, and to mark on the marginal record thereof in the office of the Probate Judge of Mobile County, Alabama, that said deed has been cancelled and surrendered.

II

That the United States District Court for the Southern Division of the Southern District of Alabama, erred in rendering that portion of said decree insofar as it applied to the lands and property hereinabove described, which is as follows, viz:

4. It is further ordered, adjudged and decreed that the two above described parcels of land, towit: That parcel known as 1116 Government street, in the City of Mobile, Alabama, and that parcel known as 55-57 and 59 North Royal Street in the City of Mobile, Alabama, and *and* which are more particularly described in the preceding paragraphs of this decree, be sold by the United States Marshal*l* of the United States District Court for the Southern District of Alabama, to the highest, last and best bidder, for

cash, at public outcry at the Government street entrance of the Court House of Mobile County, in the City of Mobile, Alabama, after advertising such sale for six consecutive weeks in a newspaper of general circulation of the City of Mobile, Alabama, said property is to be sold separately, said separate sales to be subject to confirmation by this Court.

III

That the United States District Court for the Southern Division of the Southern District of Alabama, erred in rendering the following portion of said decree insofar as it applies to this appellant, siz:

8. It is further ordered, adjudged and decreed that if the said Leila Zimmern and the said Samuel Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern fail or refuse to mark on the marginal record of the above described deeds in the office of the Probate Judge of Mobile County, Alabama, that said deeds have been cancelled as ordered in [fol. 83] paragraphs 2 and 3 of this decree, that the clerk of this Court do, and he is hereby ordered to mark on said marginal records of such deeds in the office of said Probate Judge that said deeds have been cancelled.

Wherefore the Appellant prays that said decree be reversed, and that said District Court for the Southern Division of the Southern District of Alabama, be ordered to enter a decree reversing the decision of the lower Court in said cause insofar as it applies to this Appellant as hereinabove set forth.

Norman H. Rattner, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 84] In United States District Court

[Title omitted]

Petition of Samuel Joseph Zimmern, Jr., and Janice Zimmern for Appeal.—Filed Nov. 10, 1934

To the Honorable Robert T. Ervin, District Judge:

The above named Samuel Joseph Zimmern, Jr., and Janice Zimmern, feeling aggrieved by the decree rendered

in the above entitled cause upon to-wit, the 3rd day of March, 1934, and the amendment thereof rendered on the 13th day of August, 1934, in response to a motion for a rehearing duly filed in said Court, and which motion in its remaining aspects was overruled upon to-wit, the 13th day of August, 1934, do hereby appeal from said decree to the Circuit Court of Appeals for the Fifth Judicial Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that the transcript of the record, proceedings and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Fifth Judicial Circuit under the rules of such Court in such cases made and provided.

Your Petitioners further show that upon to-wit, November 8th, 1934, they notified Bernice L. Levinsohn by telegram of their intention to prosecute this appeal, and that the said Bernice L. Levinsohn upon the same day refused to join therein, said refusal having been made by telegram.

And your petitioners further pray that the proper order relating to the security to be required of them be made.

Norman H. Rattner, Attorney for Petitioners.

[File endorsement omitted.]

[fol. 85] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS.—Filed Nov. 10, 1934

Now comes Samuel Joseph Zimmern, Jr., and Janice Zimmern, certain defendants in the above entitled cause, and file the following assignments of error, upon which they will rely upon their prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court, upon to-wit, the 3rd day of March, 1934.

I

That the United States District Court for the Southern Division of the Southern District of Alabama, erred in

rendering that portion of said decree which applies to these appellants, viz.:

3. It is further ordered, adjudged and decreed that the deed executed by Samuel Zimmern and his wife, Leila Zimmern, on the 26th day of January, 1928, to Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern, and which is found of record in Deed Book No. 218 N. S., at page 236, in the office of the Judge of Probate of Mobile County, Alabama, and which conveys to the grantees mentioned in said deed the following described property:

That lot of land with the improvements thereon situated on the West side of Royal street, second South of St. Michael Street, having a front of about 63 feet, 6 inches, more or less, on the West side of Royal Street, and running westwardly about 99 feet more or less of the depth of said lot of land, said lot of land being bounded on the North by a property now or formerly of the Mobile Register and East by Royal street, said property being known as Nos. 55, 57 and 59 North Royal Street, and all of which is in the city and county of Mobile.

[fol. 86] be and the same is set aside, annulled, cancelled and held for naught and declared to be void.

It is further ordered that the Grantees in said deed, Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern, be and they are hereby required to surrender said deed and to mark on the marginal record thereof in the office of the Probate Judge of Mobile County, Alabama, that said deed has been cancelled and surrendered.

II

That the United States District Court for the Southern Division of the Southern District of Alabama, erred in rendering that portion of said decree insofar as it applied to the lands and property hereinabove described, which is as follows, viz.:

4. It is further ordered, adjudged and decreed that the two above described parcels of land, to-wit: That parcel known as 1116 Government Street in the City of Mobile, Alabama, and that parcel known as 55, 57 and 59 North

Royal Street in the City of Mobile, Alabama, and which are more particularly described in the preceding paragraphs of this decree, be sold by the United States Marshall of the United States District Court for the Southern District of Alabama, to the highest, last and best bidder, for cash, at public outcry at the Government Street entrance of the Court House of Mobile County, in the City of Mobile, Alabama, after advertising such sale for six consecutive weeks in a newspaper of general circulation of the City of Mobile, Alabama, said property is to be sold separately, said separate sales to be subject to confirmation by this Court.

III

That the United States District Court for the Southern Division of the Southern District of Alabama, erred in rendering the following portion of said decree insofar as it applies to these appellants, viz.:

8. It is further ordered, adjudged and decreed that if the said Leila Zimmern and the said Samuel Zimmern, Jr., [fol. 87] Bernice L. Levinsohn and Janice Zimmern fail or refuse to mark on the marginal record of the above described deeds in the office of the Probate Judge of Mobile County, Alabama, that said deeds have been cancelled as ordered in paragraphs 2 and 3 of this decree, that the Clerk of this Court do, and he is hereby ordered to mark on said marginal records of such deeds in the office of said Probate Judge that said deeds have been cancelled.

Wherefore, the Appellants pray that said decree be reversed, and that said District Court for the Southern Division of the Southern District of Alabama, be ordered to enter a decree reversing the decision of the lower court in said cause insofar as it applies to these Appellants, as hereinabove set forth.

Norman H. Rattner, Attorneys for Appellants.

[File endorsement omitted.]

[fol. 88] IN UNITED STATES DISTRICT COURT

DEED OF TRUST—Filed Nov. 28, 1934

This deed, made this 27th day of November, in the year 1934, by Leila Zimmern and Samuel Zimmern, in the county of Mobile and state of Alabama, witnesseth:

That in consideration of the trust hereinafter mentioned and created, and of the sum of one dollar to us in hand paid, the receipt whereof is hereby confessed and acknowledged, we, the said Leila Zimmern and Samuel Zimmern, do grant, bargain, sell and convey unto Virgil C. Griffin, as trustee, upon the trust hereinafter set forth, the following described property located and situated in Mobile County, Alabama, and described as follows, to-wit:

The South ½ of Section Five (5), Township One (1) Range Four (4) West, containing Three Hundred and Twenty (320) acres, more or less. Being the same property conveyed to Leila Zimmern by deed from Samuel Zimmern dated July 30th, 1914, and recorded in Deed Book No. 162, NS, page 583, of the records in the office of the Judge of the Probate Court of Mobile County, Alabama.

To have and to hold the granted premises, with all the rights, easements, and appurtenances thereto belonging, to the said Virgil C. Griffin, his heirs and assigns, to his and their own use and behoof forever, but only upon the following trust, viz.,

Whereas the said Leila Zimmern was one of the respondents in a suit brought by the United States of America against Samuel Zimmern, et al, in the United States District Court for the Southern Division of the Southern District of Alabama, and has taken an appeal from the decree rendered therein to the Circuit Court of Appeals for the Fifth Judicial Circuit and has been unable to pay or secure the costs of said appeal. Now, if the costs of said appeal should be taxed against the said Leila Zimmern, and she should fail to pay the same within thirty days, then the said grantee may sell said lands, and, after paying out of [fol. 89] the proceeds of said sale any liens or charges upon said lands, may apply the balance thereof to the payment of the costs of said appeal, and then if there should yet be a balance in his hands of said purchase money, he shall pay the same over to the said Leila Zimmern, but if the said Leila Zimmern shall pay said costs within thirty

days after they shall have been taxed against her, or if said costs should not be taxed against her, then this deed shall be void and of no effect.

In witness whereof, we, the said Leila Zimmern and Samuel Zimmern, have hereunto set our hands and seals this 27 day of November, 1934.

Leila Zimmern. (Seal.) Samuel Zimmern. (Seal.)

STATE OF ALABAMA,
Mobile County:

I, K. C. Cuthbert, the undersigned, a notary public in and for the county and state aforesaid, hereby certify that Leila Zimmern and Samuel Zimmern, whose names are signed to the foregoing conveyance, and who are known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand this 27 day of November, A. D., 1934.

K. C. Cuthbert, Notary Public, Mobile County, Alabama. (Seal.)

[fol. 90] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed Dec. 3, 1934

This cause coming on to be heard on this 27th day of November, 1934, on motions of Norman H. Rattner and Jesse F. Hogan, Solicitors and counsel for the Defendants, Samuel Zimmern, Leila Zimmern, Janice Zimmern, and Samuel Joseph Zimmern, Jr., for an appeal, for a severance as to Bernice L. Levinsohn, and for the privilege of taking this appeal without pre-paying the costs of the appeal or securing the same, except as hereinafter set forth; and it appearing to the Court that Bernice L. Levinsohn co-defendant in said cause has been duly notified and requested by Samuel Joseph Zimmern, Jr., and Janice Zimmern to join in their petition for appeal, but has failed or refused to join therein, and the said Janice Zimmern and Samuel Joseph Zimmern, Jr., and also the said Samuel Zimmern and Leila Zimmern are hereby granted a severance against Bernice L. Levinsohn and the right to appeal

alone, without joining the said Bernice L. Levinsohn as appellant.

It also appearing that each of said defendants, viz: Leila Zimmern, Samuel Zimmern, Janice Zimmern and Samuel Joseph Zimmern, Jr., has filed an affidavit, the said Leila Zimmern's affidavit being verified on the 9th day of November, 1934, and the affidavits of the others, each being verified on the 10th day of November, 1934, said affidavits setting up the inability of said defendants to pay or secure the payment of the costs of said appeal except that the said Leila Zimmern has delivered a deed of certain *of cer-*
[fol. 91] *tain* lands in Mobile County, Alabama, to Virgil C. Griffin, Clerk of this Court, in trust to provide for the payment of said costs; it is,

Ordered that the said Leila Zimmern, Samuel Zimmern, Janice Zimmern and Samuel Joseph Zimmern, Jr., be allowed to prosecute this appeal without being required to pre-pay the fees or costs thereof, because of their poverty, as alleged in said affidavit; and it is further ordered that all judicial officers who have occasion to perform services herein, shall perform the same as if the deposit for costs or security for costs had been given; and it is further ordered that if any of said parties shall reverse the decree heretofore rendered in this cause, all costs for services rendered by officers, as aforesaid, shall be paid, and a lien upon any property awarded to said parties will be given to secure the payment of all such costs and fees due and unpaid.

It is also ordered that the appeal of the said Samuel Zimmern, the appeal of Leila Zimmern and the appeals of Janice Zimmern and Samuel Joseph Zimmern, Jr., to the United States Circuit Court of Appeals for the Fifth Circuit, from the decree heretofore filed and entered herein, be, and the same are hereby allowed;

That a certified transcript of the record, decree, exhibits, stipulations and all proceedings be forthwith transmitted to said Circuit Court of Appeals, but that only three transcripts shall thus be sent.

Dec. 3, 1934.

Robert T. Ervin, Judge of the United States Court for the Southern Division of the Southern District of Alabama.

[File endorsement omitted.]

[fol. 92] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR TRANSMITTAL OF EXHIBITS—Filed Feb. 6, 1935

On motion of counsel for defendants in the above styled cause,

It is ordered that Exhibits "A," "B" and "C" introduced in evidence in this cause be forwarded to the Circuit Court of Appeals for the Fifth Circuit in their original form.

Done this 6th day of February, 1935.

Robert T. Ervin, Judge.

[File endorsement omitted.]

[fols. 93 & 94] Clerk's certificate to foregoing transcript omitted in printing.

RECITAL AS TO CITATION

Citation omitted from the record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

[fol. 95] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7702

SAMUEL ZIMMERN et al., Appellants,

versus

UNITED STATES OF AMERICA, Appellee

On Appeal from the District Court of the United States for the Southern District of Alabama

MOTION OF APPELLEE TO DISMISS—Filed October 19, 1935

Now comes the United States, by its attorneys, and moves the Court to strike the brief heretofore filed on this appeal

by the appellants, or by their solicitors of record, and to dismiss the appeal, addressing this motion separately as to the appeal filed by each appellant, and severally as to the appeal of appellants, upon the following separate and several grounds, and for the reasons that:

1. This Court has no jurisdiction of this appeal.

2. The appeal was not taken in time.

3. Application for an appeal to this court was not duly made within three months after the entry of the judgment [fol. 96] or decree, as required by the Act of Feb. 13th, 1925, § 8 (c) (Section 230, Title 28, U. S. C.).

4. The application for appeal was not made or filed within three months after the entry of the decree of March 3, 1934.

5. The application for appeal was not made until November 10, 1934, whereas the decree appealed from was made and entered March 3, 1934.

6. The motion or petition for rehearing filed by Samuel Zimmern on August 11, 1934, was filed more than three months after the decree was entered on March 3, 1934.

7. The motion for a rehearing was not filed within three months after the decree was entered on March 3, 1934.

8. The time within which the appellants might have filed this appeal expired three months after March 3rd, 1934, prior to which expiration no appeal was filed or applied for.

9. Because the brief filed on behalf of appellants fails to conform with the rules of this court respecting the preparation of briefs.

Frank J. Wideman, Assistant Attorney General; Sewall Key, S. E. Blackham, Special Assistants to [fol. 97] the Attorney General; Francis H. Inge, United States Attorney; Leo H. Pou, Assistant United States Attorney, Solicitors for the United States.

In order to conform with Rule XXI, Subdivision 1, of this Court, providing that all motions to the Court shall contain a brief statement of the facts and objects of the

motion, the following statement is made in support of the foregoing motion.

The argument made and authorities cited in support of the motion are printed as a part of the brief filed in this cause on behalf of the United States, and no effort will be made to repeat them here.

On March 3, 1934, Honorable Robert T. Ervin, Judge of the District Court, rendered a final decree in this cause, which was entered of record on the same date. (Record pp. 67-70.) On May 11, 1934, an order was made extending the term ninety days from May 28, 1934. (Rec. p. 71.) On August 11, 1934, after the expiration of three months from the date of the decree, Samuel Zimmern, one of the appellants, filed a petition for rehearing. (Rec. pp. 72-74.) On August 13, 1934, the petition for rehearing was denied as to all prayers of the petition for rehearing except that the Court amended its decree of March 3, 1934, in conformity with a request contained in the petition for rehearing. (Rec. p. 75.) Thereafter, and on November 10, 1934, Samuel Zimmern filed his application for an appeal and assignments of error. (Rec. pp. 76-79.) On the same date Leila [fol. 98] Zimmern filed her application for appeal and assignments of error. (Rec. pp. 80-83.) On the same date Samuel Joseph Zimmern, Junior, and Janice Zimmern jointly filed an appeal and assignments of error. (Rec. pp. 84-87.) The order allowing the appeal was not made until December 3, 1934. (Rec. pp, 90-91.)

The purpose of the foregoing motion is to obtain dismissal of the appeal as to all appellants, due to the fact that no one of them filed an appeal within three months after the decree of March 3, 1934, and to the fact that the petition for rehearing of Samuel Zimmern, filed on August 11, 1934, did not extend the time for an appeal either as to him or the other appellants, since it was not filed within three months after the decree of March 3, 1934.

Frank J. Wideman, Assistant Attorney General; Sewall Key, S. E. Blackham, Special Assistants to the Attorney General; Francis H. Inge, United States Attorney; Leo H. Pou, Assistant United States Attorney, Solicitors for the United States.

I, Francis H. Inge, United States Attorney for the South- [fol. 99] ern District of Alabama, and one of the solicitors for the appellee, United States of America, do hereby cer-

tify that on the 16th day of October, 1935, I personally delivered to Jesse F. Hogan, Esquire, one of the solicitors for appellants, a true and correct copy of the foregoing motion and statement, and that on the same date I personally delivered to Norman H. Rattner, Esquire, one of the solicitors for appellants, a true and correct copy of said motion and statement.

Witness my signature this 16th day of October, 1935.

Francis H. Inge, United States Attorney and Solicitor for Appellee.

[fol. 100] IN UNITED STATES CIRCUIT COURT OF APPEALS

ANSWER OF APPELLANTS TO MOTION TO DISMISS—Filed October 22, 1935

Now come Samuel Zimmern, Leila Zimmern, and also Samuel Joseph Zimmern, Jr. and Janice Zimmern, by their solicitors, separately and severally, and for answer to the motion of the United States to strike the briefs of appellants and to dismiss the appeals, and show unto the Court as follows, viz.:

1. As the solicitors for the appellants understand the case, there is no substantial conflict in the testimony of this case. This controversy is primarily a dispute as to the principles of law applicable to the facts of the case. Besides, the clerk did not deliver a copy of the record to appellants, the appeal having been taken in forma pauperis, and solicitors for appellants did not think they could demand a copy of the record as of right. Furthermore, certain of the original documents have been sent up to the Court and it was thought that the Court would desire to examine these documents rather than the record, and then the testimony in the case is not extensive and it seemed to the solicitors that if the Court should desire to read any of the testimony they would probably want to read all of it. It was for these reasons that there was a failure to incorporate in the statement of facts any reference to the records.

2. The appellants further show that these appeals were duly taken within the time fixed by the statute. The original decree was amended upon, to wit: August 13, 1934

[fol. 101] during the term, as extended by an order of the Court made May 11, 1934. The time within which an appeal might be taken, began to run from that date, viz.: August 13, 1934. The appeal was filed on November 10, 1934, within three months from the date of the final decree. Besides, a motion for a rehearing was filed by all of the respondents within three months from the date of the decree of March 3, 1934. This motion is not set out in the record. But the record itself shows that such a motion was filed. The order of May 11, 1934 extending the term recites the following, viz.: "It appearing to the Court that a decree was entered in this cause on March 3, 1934, and for good reason shown it will be necessary to modify or amend said decree." Furthermore, the decree of August 13, 1934, recites the following, viz.: "This matter coming on to be further heard on *motion of respondents for a rehearing* of the decree entered on the 3rd day of March 1934, and being submitted on such motion and having been argued in open court, etc." And then the separate applications of the appellants for appeal, each recite that the amendment, dated August 13, 1934, of the decree dated March 3, 1934, was made in response to a motion for a rehearing duly filed in the District Court. This application was allowed by the Court, who thereby recognized that such a motion was duly made. This reference was not made to the Amended Motion for a Rehearing, for that amended motion was only made by Samuel Zim-[fol. 102] mern. Besides the relief granted by the amendment could not have referred to the Amended Petition for a Rehearing by the wildest flight of imagination. And finally the amended petition for a rehearing filed by Samuel Zimmern, only, on August 11, 1934, also corroborates the other facts of the record that show the existence of the original petition for a rehearing made by all of the appellants.

Jesse F. Hogan, Norman H. Rattner, Solicitors for Samuel Zimmern, Appellant, Leila Zimmern, Appellant, Samuel Joseph Zimmern, Jr., and Janice Zimmern, Appellants.

[fol. 103] I, Norman H. Rattner, one of the solicitors for Samuel Zimmern, Appellant, Leila Zimmern, Appellant, and Samuel Joseph Zimmern, Jr., and Janice Zimmern, Appellants, do hereby certify that on the 21st day of Oc-

tober, 1935, I personally delivered to Leo H. Pou, Esquire, one of the solicitors for Appellee and Assistant United States Attorney, a true and correct copy of said answers of appellants, separately and severally to motions of appellee.

Witness my signature this 21st day of October, 1935.

Norman H. Rattner, Solicitor for: Samuel Zimmern, Appellant, Leila Zimmern, Appellant, and Samuel Joseph Zimmern, Jr. and Janice Zimmern, Appellants.

[fol. 104] In United States Circuit Court of Appeals

[Title omitted]

Minute Entry of Argument and Submission—October 23, 1935

On this day this cause was called, and, after argument by Jesse F. Hogan, Esq., for appellants, and Francis H. Inge, Esq., United States Attorney, for appellee, was submitted to the Court.

[fol. 105] In United States Circuit Court of Appeals for the Fifth Circuit

No. 7702

Samuel Zimmern et al., Appellants,

versus

United States of America, Appellee

In Forma Pauperis

Appeals from the District Court of the United States for the Southern District of Alabama

(November 14, 1935)

Before Foster, Hutcheson and Walker, Circuit Judges

Opinion of the Court—Filed November 14, 1935

Hutcheson, Circuit Judge:

These are separate appeals of Samuel Zimmern, Leila Zimmern, Samuel Joseph Zimmern, Jr., and Janice Zim-

mern brought up on one record from a judgment canceling as null and void as against the United States, transfers Samuel Zimmern had made to his wife and children. The decree appealed from was rendered and entered March 3, [fol. 106] 1934. On August 11, 1934, long after the expiration of three months from the date of the final decree, the appellant Samuel Zimmern filed a motion for rehearing. On August 13, 1934, the trial court having added a paragraph, denied the motion as to the original decree. The petitions for appeal and the assignments of error were filed November 10, 1934 and the appeals were allowed.

Appellee, insisting that this Court is without jurisdiction of the appeal because taken too late, moves that it be dismissed. Appellants argue that the three months must be counted from the overruling of the motion for rehearing. It is perfectly clear that all of the appeals, except that of Samuel Zimmern, were filed too late, for only Samuel filed motion for rehearing. It is equally clear that his appeal was filed too late, for though he did file a motion for rehearing he filed it more than three months from the date of the final decree. A motion for rehearing so filed is not timely nor duly filed. It had no effect to extend the appeal time. Chicago M. & St. P. Railroad vs. Leverentz, 19 Fed. (2d) 915; Northwestern Pub. Service Co. vs. Pfeiffer, 36 Fed. (2d) 5; McIntosh vs. United States, Gilliam vs. United States, 70 Fed. (2d) 507; Stradford vs. Wagner, 64 Fed. (2d) 749.

We are without jurisdiction of the appeals. They are dismissed.

[fol. 107] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7702

SAMUEL ZIMMERN et al.

versus

UNITED STATES OF AMERICA

JUDGMENT—November 14, 1935

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the appeals herein be, and the same are hereby, dismissed.

[fol. 108] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed Dec. 3, 1935

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes Samuel Zimmern, Leila Zimmern, and Samuel Joseph Zimmern, Jr. and Janice Zimmern, the appellants, separately and severally, in the above-entitled cause, and being aggrieved by the decree of this Court entered on November 14, 1935, present this, their petition, for a rehearing of the above entitled cause, and respectfully pray the Court to grant them a rehearing of the above entitled cause, and, in support thereof, respectfully show:

I

The appeals were taken expressly from the decree of March 3, 1934, as amended on August 13, 1934, as shown by the record, viz.: "The above named Samuel Zimmern, feeling aggrieved by the decree rendered and entered in the above entitled cause upon to wit: the 3rd day of March, 1934, and the amendment thereof rendered on the 13th day of August, 1934—" (R. 76), "The above named Leila Zimmern, feeling aggrieved by the decree rendered and entered in the above entitled cause upon to wit: the 3rd day of March, 1934, and the amendment thereof rendered on the 13th day of August, 1934—" (R. 80), "The above named Samuel Joseph Zimmern, Jr., and Janice Zimmern, feeling aggrieved by the decree rendered in the above entitled [fol. 109] cause upon to-wit: the 3rd day of March, 1934, and the amendment thereof rendered on the 13th day of August, 1934" (R. 84). The appeals were taken from the

amended decree. The time within which an appeal might be taken began to run from the last named date, viz.: August 13, 1934.

II

The amendment of August 13, 1934, being paragraph 9, and as follows, viz.: "It is further Ordered and Decreed that the lands and appurtenances thereto mentioned and described and ordered to be sold by this decree be sold subject to any *dower* rights of the respondent Leila Zimmern—"(R. 75), was not a mere correction of the decree, but is a matter of substance. The decree did not become final for the purpose of an appeal until the date of the amendment, when all of the issues of the case were finally settled.

III

The record shows that the Court entertained a petition for a rehearing presented within three months after the decree of March 3, 1934. The portions of the record relied on are as follows: "It appearing to the Court that a decree was entered in this cause on March 3, 1934 and *for good cause shown* it will be necessary to modify or amend said decree, etc." (R. 71), "This matter coming on to be further heard *on motion of respondents for a rehearing* of the decree entered on the 3rd day of March, 1934, and *being submitted on such motion,* etc." (R. 75).

IV

A petition for rehearing in behalf of Mrs. Leila Zimmern was before the Court on May 11, 1934 when the Court extended the term by the following order, viz.: "It appearing to the Court that a decree was entered in this cause on March 3rd, 1934 and *for good reason shown* it will be necessary to modify or amend said decree, etc." (R. 71). A copy of said petition for rehearing in behalf of Mrs. Leila Zimmern, and affidavit of counsel, is attached hereto and made a part of this petition, and said petition for rehearing is marked Exhibit "A" for purpose of identification. This petition for rehearing prayed for dower, the Court in its amended decree of August 13, 1934 granted such relief, viz.: "It is further Ordered and Decreed that the lands and

appurtenances thereto mentioned and described and ordered to be sold by this decree be sold subject to any *dower rights* of the respondent Leila Zimmern" (R. 75).

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, and that the decree of the Court be upon further consideration reversed, and that the appeals be allowed.

[fol. 110] Respectfully submitted, Jesse F. Hogan, Norman H. Rattner, Counsel for Samuel Zimmern, Appellant, Leila Zimmern, Appellant, Samuel Joseph Zimmern, Jr., and Janice Zimmern, Appellants.

[fol. 111] [Title omitted]

AFFIDAVIT OF HARRY T. SMITH

STATE OF ALABAMA,
Mobile County:

I hereby certify that I was counsel of record for Mrs. Leila Zimmern in the case of the United States of America versus Samuel Zimmern, et als., heretofore pending in the United States District Court for the Southern District of Alabama, in Equity No. 132, at the time the deeree of March 3, 1934 was rendered, and also at the time said decree was amended on August 13, 1934, that I presented to the Judge of said Court a petition for rehearing in behalf of Mrs. Leila Zimmern in said cause prior to the order of May 11, 1934 extending the term of said Court, and in pursuance thereof the decree of August 13, 1934 amending the decree of March 3, 1934 was rendered, and that a copy of said petition for rehearing is attached hereto.

Harry T. Smith.

Dated this 29th day of November, 1935.

STATE OF ALABAMA,
Mobile County:

Before me, Lillie B. Grandahl, Notary Public, Mobile County, Alabama, personally appeared Harry T. Smith, who, being by me first duly sworn, deposes and says that

the statements contained in the foregoing certificate are true.

Sworn to and subscribed before me this 29th day of November, 1935.

Lillie B. Grandahl, Notary Public, Mobile County, Alabama. (Notary Seal.)

[fol. 112] EXHIBIT "A" TO PETITION FOR REHEARING

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

In Equity. No. 132

UNITED STATES OF AMERICA, Complainant,

versus

SAMUEL ZIMMERN et als., Defendants

Petition for Rehearing

Ordinarily a decree for the sale of land belonging to one of the defendants, needs no qualification as to the title which is to be sold, as it could not be binding on any person owning an interest in the land who is not a party to the case. When, however, a decree of sale condemns and orders the sale of certain property, without specifying whose interest in the property is to be sold, it purports to operate as a sale of the interest of all of the defendants in the cause. For instance, the decree in this case, which orders the property to be sold as a whole without any reference whatever to the question as to whose title it is that is condemned, would include a sale, not only of the interest which is vested in the debtor, Samuel Zimmern, but also the dower interest which is vested in Mrs. Leila Zimmern, who is not indebted to the [fol. 113] United States Government and whose dower interest in the property is not subject to sale under execution against her husband, Samuel Zimmern, and which dower interest could not be made subject to the payment of Mr. Zimmern's debts by setting aside and cancelling the deeds conveying to her and to her children the interest of her husband which was subject to execution for his debts. The

several conveyances which were executed by Samuel Zimmern to his wife and children, respectively, having been declared to be void and having been set aside and cancelled, the title to this property stood, of course, precisely as if no such conveyances had been executed, that is to say, the title which is vested in Samuel Zimmern is subject to the dower rights of Mrs. Zimmern, and this dower right cannot be sold for the payment of her husband's debts. The authorities to this effect are gathered in the 19th Corpus Juris, page 519, where it is said:

"Where the lien of the execution under which the lands of a husband were levied upon and sold antedated the marriage, the wife's dower right is thereby divested. But if the wife's dower had attached at the time the lien arose, her right to dower is not impaired thereby in the absence of special statute changing the rule, and the purchaser at the execution sale acquires no greater or better title, so far as such right is concerned, than could have been vested in him by the voluntary conveyance of the husband at the date of the inception of the lien."

There are a great many authorities cited in Note 83 on page 520 in 19 C. J., to the same effect, including:

Callahan v. Nelson, 128 Ala., 671.
Wood v. Morgan, 56 Ala., 397.
Nance v. Hooper, 11 Ala., 552.

[fol. 114] The reason for the distinction to which we have referred between cases where the wife is not a party, so that a decree of sale could not possibly be construed as intended to include her dower interest, on the one part, and cases where the wife is a party and the terms of the decree are broad enough to cover the entire interest in the property sold, is pointed out in the 19th Corpus Juris, page 519.

Of course, the question as to whether the decree is to be construed as intending to order the sale of the entire interest or only the interest of the debtor (husband) in the property, or in other words, whether the decree intends to subject the dower interest vested in the wife or not, is a matter of construction, but we are afraid that the language of the decree, as rendered, is broad enough to cover all interests in the property, and if such a construction should be placed upon it, then Mrs. Zimmern, being a party to the

case, would be bound by the decree, howsoever erroneous it might be in this particular, and her only remedy is by this petition to clarify the construction of the decree in this particular or by appeal. We are quite well assured that it was not the intention of the Court to condemn Mrs. Zimmern's dower interest in this property, which was not subject to this debt, and we are, therefore, petitioning for a modification of the decree in this respect.

We do not imagine that the Court had any purpose to so order. Our thought is that in drawing this decree, the Court intended only to condemn the interest in the property [fol. 115] which was owned by the debtor (husband) and simply overlooked the fact that as Mrs. Zimmern was a party defendant, it was necessary to specify in the decree that it was the interest of the husband that was to be condemned and sold and not the interest of the wife, who was in no wise indebted and whose dower right could not be subjected to the payment of her husband's debts.

For these reasons, we respectfully apply, on behalf of Mrs. Samuel Zimmern, for a rehearing, to the extent of modifying the decree of sale so as to refer exclusively to her husband's interest in this property and not to include her dower interest.

Respectfully submitted, Harry T. Smith & Caffey.

[fol. 116] We, Jesse F. Hogan, and Norman H. Rattner, counsel for the above named Samuel Zimmern, Leila Zimmern, and Samuel Joseph Zimmern, Jr., and Janice Zimmern, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Jesse F. Hogan, Norman H. Rattner, Counsel for Samuel Zimmern, Appellant, Leila Zimmern, Appellant, and Samuel Joseph Zimmern, Jr., and Janice Zimmern, Appellants.

I, Norman H. Rattner, one of the Solicitors for Samuel Zimmern, Appellant, Leila Zimmern, Appellant, and Samuel Joseph Zimmern, Jr., and Janice Zimmern, Appellants, do hereby certify that on the 2nd day of December, 1935, I personally delivered to Francis H. Inge, Esquire, United States Attorney for the Southern District of Alabama, one

of the Solicitors for Appellee, a true and correct copy of the foregoing petition for rehearing.

Witness my signature this 2nd day of December, 1935.

Norman H. Rattner, Solicitor for Samuel Zimmern, Appellant, Leila Zimmern, Appellant, Samuel Joseph Zimmern, Jr., and Janice Zimmern, Appellants.

[fol. 117] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

MOTION OF LEILA ZIMMERN TO REVOKE DISMISSAL, ETC.—Filed December 3, 1935

Now comes Leila Zimmern, Appellant, by her Solicitors, and respectfully shows unto the Court the following, viz:

That Harry T. Smith & Caffey, Esquires, and Smith & Johnston, Esquires, represented the Appellants in the trial court. Jesse F. Hogan, one of the Solicitors for Appellants did not come into the case until the petitions for appeal were filed after the amending decree of August 13, 1935; while Norman H. Rattner, the other Solicitor for Appellants became counsel of record for Samuel Zimmern on August 11, 1934, when he filed a petition for rehearing in behalf of Samuel Zimmern.

When making up the præcipe for the clerk with respect to the contents of the record, counsel for appellants noted the absence of the petition for rehearing. It was understood, however, that the time for taking the appeal began to run from the date of the amended decree, and that it would not be necessary to incorporate that petition in the record.

Since the dismissal of the appeals further search has been made and a copy of the original petition for rehearing has been obtained from Harry T. Smith, Esquire, and a copy thereof has been attached to the petition for rehearing. The original petition was presented to the Court, upon which the Court acted in making the order of May 11, 1934, extending the term, and in rendering the decree of August 13, 1934, amending the decree of March 3, 1934, as shown by the Affidavit of Harry T. Smith, Esquire.

This petition was not made a part of the record through clerical over-sight.

This petition for rehearing was filed in behalf of Mrs. Leila Zimmern,

Wherefore, Mrs. Leila Zimmern, Appellant, prays that the dismissal of her appeal be revoked, and that the submission of her appeal be set aside, and that time be given within which she may take the necessary and proper steps to have this omission in the record supplied by requesting the lower Court to correct its record by making her peti-
[fol. 118] tion for a rehearing is said Court a part of the record and then have the corrected record brought up by a writ of certiorari. This procedure would seem to be in accord with the holding in the case of Chicago v. Bigelow, 131 U. S. Appendix XCIII, 19 L. ed. 257, 4 C. J. 507, §2268 note 12.

Respectfully submitted, Jesse F. Hogan, Norman H. Rattner, Counsel for Mrs. Leila Zimmern, Appellant.

Duly sworn to by Jesse F. Hogan and Norman H. Rattner. Jurat omitted in printing.

I, Norman H. Rattner, one of the solicitors for Leila Zimmern, Appellant, do hereby certify that on the 2nd day of December, 1935, I personally delivered to Francis H. Inge, United States Attorney for the Southern District of Alabama, one of the solicitors for appellee, a true and correct copy of the foregoing motion.

Witness my signature this 2nd day of December, 1935.

Norman H. Rattner, Solicitor for Mrs. Leila Zimmern, Appellant.

[fol. 119] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7702

SAMUEL ZIMMERN et al., Appellants,

versus

UNITED STATES OF AMERICA, Appellee

In Forma Pauperis

Appeals from the District Court of the United States for the Southern District of Alabama

On Petition for Rehearing

(January 16, 1936)

Before Foster, Hutcheson and Walker, Circuit Judges

OPINION ON PETITION FOR REHEARING—Filed January 16, 1936

By the COURT:

While a careful reconsideration convinces us that we did not err in dismissing the appeals, we think our reasons for doing so should be more fully stated.

[fol. 120] All of the petitions insist that the appeal time runs not from March 3, 1934, when the decree ordering sale was entered, but from August 13, 1934, when the ninth paragraph was added, providing that the property was to be sold subject to Mrs. Zimmern's dower rights. If they are correct in this, their appeals were in time.

Mrs. Leila Zimmern, in addition, presents the point that she did file a motion for rehearing in time, and that her time for taking the appeal did not commence to run until that motion was acted on. She attaches to her motion filed here, a copy of what she calls her "motion for new trial", and asks that since it does not appear in the record, we have the record corrected to bring it up.

When we decided the case we thought that the addition of the ninth paragraph was not the making of a new decree, and that the time for appealing must be computed

from the entry of the original decree. Since the record did not show the filing of any other motion than the one Zimmern filed, we thought the motion styled "amended" filed by him after the appeal time had run came too late to avail him, and that the others were too late since they had not filed any motion.

Taking the copy of the "petition for rehearing" attached to her petition for rehearing here as a correct copy of what she atcually filed in the trial court, we still think the appeal time ran as to her from the entry of the original decree, and that she appealed too late.

The District Court petition for rehearing she sets out as Exhibit "A" to her petition for rehearing in this court, did not seek to set the decree aside. It did not complain of the decree in any of the particulars of which she now complains. It accepted the decree as to the sale of Samuel Zimmern's interest. It merely set up that since she was a party defendant to the suit the Government had brought, [fol. 121] the decree as entered might cast a cloud upon her dower interest, and it ought therefore to be definitely stated in it that her dower interest was not being sold. This was a matter, as the petition shows, not of complaint against, but of the construction of the decree. The point made in the petition was merely that the decree be so worded as to make certain that it would carry the construction that the court had intended to sell, not her dower interest, but only Samuel Zimmern's interest in the property. The petition for rehearing she filed in the District Court concludes this way:

"For these reasons we respectfully apply, on behalf of Mrs. Samuel Zimmern, for a rehearing to the extent of modifying the decree of sale so as to refer exclusively to her husband's interest in the property, and not to include her dower interest."

After this petition was filed the court entered an order:

"It appearing to the court that a decree was entered in this cause on March 3, 1934, and for good reasons shown it will be necessary to modify or amend said decree, it is ordered that the November term of this court is extended for ninety days in which time all matters and orders in connection with this cause and the amendments to the decree, may be entered."

Thereafter Samuel Zimmern, on August 10, 1934, came into the cause with what he styled an "amended petition of defendant for rehearing." This petition recited that he had been taken by surprise on the trial by the statement of counsel conducting it that he did not represent him, Zimmern. Thereupon, after saying that because of that surprise Zimmern had not presented his defenses properly, he proceeds with his motion for rehearing attacking the [fol. 122] decree. On the 13th of August the decree was amended, reciting—

"This matter coming on to be further heard on motion of respondents for a rehearing of the decree entered on March 3, 1934, and it appearing to the court that the lands should be sold subject to respondent Leila Zimmern's dower rights, it is ordered that the decree be amended by adding Paragraph #9 and that as to all other matters and on all other grounds, the motion for rehearing is denied."

Taking up first Mrs. Leila Zimmern's status as affected by the motion for rehearing she filed in the trial court, it seems quite plain that in the sense of a motion for rehearing attacking the decree and endeavoring to set it aside, no motion was filed by her. She merely asked for an addition to the decree, and got it. We do not think that such a petition as she filed operates as to the decree itself, to extend the time of appealing from it within the decisions holding that the decree denying the motion for new trial and not the original decree, is the final decree from which an appeal should be taken. U. S. Shipping Board Emergency Fleet Corp. vs. Galveston Dry Dock & Con. Co., 13 Fed. (2d) 607; Mortgage Loan Co. vs. Livingston, 45 Fed. (2d) 28; Union Guardian Tr. Co. vs. Testori, 47 Fed. (2d) 689; Mitchell vs. Maurer, 67 Fed. (2d) 266; Payne vs. Garth, 285 Fed. 301; Kingman vs. Western Mfg. Co., 170 U. S. 675.

All of these cases were cases in which motions attacking the decree or judgment were denied; not as here, where motions accepting the decree, but asking an addition to it, were granted. These cases have for their reason that a judgment is not final as long as a motion to set it aside is pending. Here there was no motion to set the judgment aside, only a petition to say what was already implied in

[fol. 123] the decree. Such a petition not attacking the decree, nor seeking to set it aside, could not extend the time for appeal from it. Since therefore, if the petition were filed here it could not affect the result, it is unnecessary to amend the record by ordering it brought up.

Taking up the other question, which applies equally to all the appellants, that the real decree appealed from was not the original, but the amended decree, we think the same considerations which guided and governed the decision of the first point guide and govern this. It is of course, the general rule that the appeal is from the final decree, and under that rule if after a decree has been entered a later one is entered taking the place of the first one, it is the later decree and not the first one, which is appealed from as the final decree.

"The general rule is that the time for taking an appeal runs from the rendition of an appealable judgment." 3 C. J. 1055. "This general rule as to the running of time, holds good when a judgment is amended or modified in particulars not changing its character." 3 C. J. 1047; Alabama Coal vs. State, 54 Ala. 36; Savings Society vs. Horton, 63 Calif. 310; Agassiz vs. Kellaher, 39 Pa. 228; Crowell vs. U. S. 281 Fed. 835. If however, the amendment is in a particular changing the character of the decree, the time of the amendment to the judgment or order must be taken as the true date of its rendition." 3 C. J. 1058-1059; Billson vs. Lardner, 69 N. W. 477; Potter's Estate, 74 Pac. 986; Hayes vs. Silver Creek, 868 Pac. 704; 26 T. C. A. 387; 23 T. C. A. 1; Same, 63 S. W. 1056; 63 S. W. 602.

In Billson vs. Lardner, the trial court first made findings of fact and an order, and then, by agreement of parties, made new findings of fact and a new order on them, and these were substituted for the first. Held, appeal dated from the last order.

[fol. 124] In Potter's Estate a judgment dismissing a petition for specific performance was amended by adding a judgment for costs. Held, the amended judgment was the appealable one.

Appellants argue their motion as though the August entry was a new decree. We do not think it was. The old decree stood without change, except that there was written into it a clause making clear what was already implicit in it, that Mrs. Zimmern's dower interest was not being sold.

Neither the petition for rehearing Mrs. Zimmern filed, nor the amended motion filed too late by Samuel Zimmern, nor the August addition to the decree had any effect to enlarge the time for appealing from the decree of March 3rd. All of the appellants were too late in taking their appeals.

The motion for rehearing is denied.

[fol. 125] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—January 16, 1936

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 126] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

[Title omitted]

MOTION FOR ORDER STAYING MANDATE—Filed January 25, 1936

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Your petitioners, Samuel Zimmern, Leila Zimmern, Samuel Joseph Zimmern, Jr. and Janice Zimmern, separately and severally, respectfully present this their applications for an order staying the issuance of the mandate of this Court to the United States District Court for the Southern District of Alabama, Southern Division, in said proceedings following the judgment rendered in the above cause on the 14th day of November, 1935, dismissing said appeals, and the denial of the petitions for rehearing upon January 16, 1936, under the provisions of Section 350 of Title 28 of the United States Code, to enable said petitioners to apply for writs of certiorari from the Supreme Court of the United States.

The reasons why a stay is deemed necessary are that your petitioners intend to file their petitions for writs of certiorari in the Supreme Court of the United States on or before the 16th day of April, 1936, and your petitioners are advised that, in order that the proceedings may remain in their present status pending the disposition of such petitions for writs of certiorari a special order of this Court is required to stay the issuing of the mandate.

Wherefore your petitioners pray that this Court enter an order directing the Clerk of your Honorable Court to hold the mandate in this cause pending the filing of the aforesaid petitions for writs of certiorari in the Supreme Court of the United States until the 16th day of April, 1936, and that if said petitions shall be filed in the Supreme Court of the United States on or before that day the mandate be further held until the Supreme Court of the United States shall act upon said petitions for the writs of certiorari aforesaid.

Respectfully submitted, Jesse F. Hogan, Norman H. Rattner, Counsel for Petitioners.

Dated January 24, 1936.

[fol. 127] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER STAYING MANDATE—Filed Jan. 25, 1936

On consideration of the application of the Appellants in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has

been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 25th day of January, 1936.

(Signed) J. C. Hutcheson, Jr., United States Circuit Judge.

[fol. 128] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 129] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 2, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: In forma pauperis. File No. 40,320. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 766. Samuel Zimmern et al., petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed February 20, 1936. Term No. 766, O. T., 1935.

FILE COPY

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 766

LEILA ZIMMERN, SAMUEL JOSEPH ZIMMERN, JR., JANICE ZIMMERN, AND SAMUEL ZIMMERN,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF.

LAWRENCE KOENIGSBERGER,
Counsel for Petitioners.

JESSE F. HOGAN,
NORMAN H. RATTNER,
Of Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 766

LEILA ZIMMERN, SAMUEL JOSEPH ZIMMERN, JR., JANICE ZIMMERN, AND SAMUEL ZIMMERN,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

I.

Summary Statement of Case

The United States of America, upon to wit, October 15, 1929 (R. 2), began a suit in Equity in the District Court for the Southern Division of the Southern District of Ala-

bama, against Samuel Zimmern, Leila Zimmern, Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn, and Janice Zimmern (R. 2).

The purpose of the bill was to cancel two deeds executed by the said Samuel Zimmern, one conveying the homestead to his wife, Leila Zimmern, and the other conveying certain other land situated in Mobile County, Alabama, to his children, the said Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern, and sell said lands to satisfy an income tax deficiency assessment of $53,236.51 against said Samuel Zimmern, with a judgment over for any deficiency. The grounds, upon which the cancellation of said deeds was sought, were that both were deeds of gift, executed "intentionally, deliberately, designedly, and fraudulently for the express purpose of avoiding and preventing the collection" of such income tax deficiency assessment (R. 2-11).

The defenses as set up in the answers as amended and by the evidence, there being no substantial conflict in the evidence, were: (1) That at the time Samuel Zimmern executed said deeds he was solvent and owned other unencumbered real and personal property, subject to execution, worth not less than $93,000.00, but that no effort had been made to subject such property, by execution or otherwise, to the payment of this income tax deficiency assessment; (2) that Samuel Zimmern was indebted to Leila Zimmern, and to said Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern in substantial amounts at the time of the execution of the respective deeds; (3) and with respect to Leila Zimmern, that, subsequent to the beginning of this suit, she borrowed from the First National Bank of Mobile and paid $10,000.00 to the United States of America for said Samuel Zimmern, to be, and which was applied upon said deficiency assessment, which loan was secured by a mortgage on the home-

stead conveyed to her, and that she has not been repaid, and that she is entitled to a lien upon the property conveyed to her, to secure the repayment of said loan (R. 13-20); (4) that said mortgage to the First National Bank is still outstanding and said First National Bank should have been made a party to this suit.

The said District Court upon to wit, March 3, 1934, rendered a decree that said deeds be cancelled and the property described therein be sold to satisfy the claim of the United States, the decree also providing that $2,000.00 of the purchase price of the homestead be paid to the said Leila Zimmern in satisfaction of her claim to the homestead exemption of Samuel Zimmern under the law of Alabama. Sec. 7882 Code of Alabama, 1923 (R. 54-57).

Prior to May 11, 1934, Leila Zimmern filed a motion for a rehearing, and asking that if the property be sold, it should be sold subject to her right of dower (R. 84-86).

On said date, May 11, 1934, the Court entered an order extending the term 90 days from May 28, 1934 (R. 57).

Thereafter, on August 13, 1934, within the term as extended, the Court amended the decree of March 3, 1934, by adding paragraph 9, which provided that the land described in said deeds should be sold subject to any rights of dower that Leila Zimmern might have (R. 60).

Bernice L. Levinsohn refused to join in an appeal to the United States Circuit Court of Appeals and a severance was had as to her (R. 72).

The said Samuel Zimmern, Leila Zimmern, Samuel Joseph Zimmern, Jr., and Janice Zimmern filed their respective applications for appeals to United States Circuit Court of Appeals, Fifth Circuit, upon to wit, November 10, 1934. They also filed affidavits that they were unable to pay the costs of said appeals, or give security therefor, and on

December 3, 1934, the Court allowed them severally to take their respective appeals *in forma pauperis* (R. 61-69).

These appeals were filed in the United States Circuit Court of Appeals and came on to be heard upon to wit, October 23, 1935. Thereafter, upon to wit, November 14, 1935, the court rendered a decree dismissing all of the appeals. The ground of dismissal was that the court was without jurisdiction to hear the appeals because they were all taken too late (R. 79-80). Thereafter upon to wit, December 3, 1935, these petitioners filed in said Circuit Court of Appeals their respective motions for a rehearing. Said Circuit Court of Appeals denied said motions upon to wit, January 16, 1936.

II.

Reasons Relied on for the Allowance of the Writ.

A.

The decision of said United States Circuit Court of Appeals that it was without jurisdiction to hear these appeals is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court. The ground of the decision was that the appeal was not taken within three months after the decree of March 3, 1934. The record, however, shows that Leila Zimmern filed a petition for a rehearing within three months from said decree of March 3, 1934 (R. 83); that said petition was disposed of on August 13, 1934 (R. 60); and applications for the appeals were filed on Nov. 10, 1934 (R. 61-68). The ruling of said Circuit Court of Appeals is believed to be in conflict with the following cases, viz: *Aspen Mining & S. Co.* v. *Billings*, 150 U. S. 31; *Kingman* v. *Western Mfg. Co.*, 170 U. S. 675; *United States* v. *Ellicott*, 223 U. S. 524; *Morse* v. *United States*, 270 U. S. 151; *Northern Pac. R. Co.* v. *Holmes*, 155 U. S. 137; *Tex. & Pac. R. Co.* v. *Murphy*, 111 U. S. 488.

B.

The decision of said Circuit Court of Appeals, that it was without jurisdiction to hear said appeals because they were taken too late, involves an important question of Federal law which has not been, but should be, settled by this Court.

C.

The decree of said United States Circuit Court of Appeals, that it was without jurisdiction to hear these appeals on the ground that they were taken more than three months after the decree of March 3, 1934, although that decree was substantially amended on August 13, 1934 (R. 60), and the said appeals were taken within three months from the date of said amendment, is believed to be in conflict with the weight of authority, as represented by the following cases, viz: *In re Potter* (Cal.), 74 Pac. 986; *Hayes* v. *Silver Creek, etc., Co.* (Cal.), 68 Pac. 704; *Johnson* v. *Foreman,* 24 Ind. App. 93, 56 N. E. 254; *Billson* v. *Lardner,* 67 Minn. 35, 69 N. W. 477; *Hall* v. *Read,* 28 Tex. Civ. App. 18, 66 S. W. 809; *Partridge* v. *Wooten* (Tex. Civ. App.), 137 S. W. 412; 3 *Corpus Juris* 1059, Sec. 1058; *Mann* v. *Halsy,* 45 Cal. 63; *Vincent* v. *Vincent,* 14 D. C. 320; 3 *Corpus Juris* 1050, Sec. 1047.

D.

The decision of said Circuit Court of Appeals, that it was without jurisdiction to hear these appeals on the grounds that the petition of Leila Zimmern for a rehearing, although presented to, and entertained by the court within three months after the original decree, did not extend the time for taking an appeal, so far departs from the accepted and usual course of procedure, as to call for the exercise of this Court's power of supervision. *Morse* v. *United States,* 270

U. S. 151; *Brackett* v. *Brackett*, 2 How. 238; *Washington G. & A. R. Co.* v. *Bradley*, 7 Wall. 575; *Memphis* v. *Brown*, 94 U. S. 715; *Tex. & P. R. Co.* v. *Murphy*, 111 U. S. 488; *Aspen Mining & S. Co.* v. *Billings*, 150 U. S. 31; *Kingman & Co.* v. *Western Mfg. Co.*, 170 U. S. 675.

III.

The Record.

A complete record of the cause, marked Exhibit "A" for identification, including all of the proceedings in the United States Circuit Court of Appeals, Fifth Circuit, is tendered herewith and expressly made a part hereof.

WHEREFORE your Petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals, Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 7702, Samuel Zimmern *et al.*, appellants, *vs.* United States of America, appellee, and that it be ordered that the record in this cause be printed at public expense, to the end that this cause may be reviewed and determined by this Court, as provided for by the Statutes of the United States, and that the judgment of said United States Circuit Court be reversed by this Court, and for such further relief as to this Court may seem proper.

LAWRENCE KOENIGSBERGER,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 766

LEILA ZIMMERN, SAMUEL JOSEPH ZIMMERN, JR., JANICE ZIMMERN, AND SAMUEL ZIMMERN,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Court Below.

The opinion of the United States District Court is not reported. It was rendered on March 3, 1934, and is found in Record pages 51-57. The opinion of the United States Circuit Court of Appeals touching the dismissal of the Appeals, is reported as *Zimmern* v. *United States,* 79 F. (2d) 703. It is found in the Record at pages 79-80, while its opinion on the denial of the motion for rehearing in said

court is not yet reported, but it was rendered on January 16, 1936. It is found in Record pages 90-93.

II.

Jurisdiction.

1. The date of the decree to be reviewed is November 14, 1935 (R. 79-80). A petition for a rehearing of the case was duly filed (R. 81-88). This petition was denied on January 16, 1936 (R. 89.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 347, Title 28, U. S. C. A.

3. This suit was brought by the United States of America, upon to wit, October 15, 1929, in the United States District Court for the Southern Division of the Southern District of Alabama, against Samuel Zimmern, Leila Zimmern, Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern. The object of the suit was to cancel two deeds, executed by Samuel Zimmern, one to Leila Zimmern, his wife, and the other to Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern, his children. Cancellation of these deeds was sought upon the ground that they were deeds of gift, executed "intentionally, deliberately, designedly and fraudulently, for the purpose of avoiding and preventing the collection" of an income tax deficiency assessment against said Samuel Zimmern for the year 1920; and that by reason of said transactions "the said tax was, and at all times since, to wit, January 26, 1928, has been made uncollectable, although timely and diligent efforts have been made to collect the same, as said Samuel Zimmern, by reason of said transfers, was left without money, assets or property from which said tax due and owing to complainant can be collected" (R. 8).

The defenses were, (1) that the said Samuel Zimmern, at the time of said conveyances, was a man of considerable wealth and that he owned other real and personal property estimated to have been then worth $93,000.00 (R. 50); (2) that, at the time of the execution of the deed to Leila Zimmern, Samuel Zimmern was indebted to her in a sum not less than $20,000.00 (R. 40); (3) that at the time of the execution of the deed to Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern, he was indebted to them in the sum of $13,000.00 (R. 35-37); (4) that Leila Zimmern should have a lien raised in her behalf to secure the repayment of the sum of $10,000.00 furnished by her for application upon, and which was applied upon said deficiency assessment (R. 37); (5) the question has also been raised that the United States could not maintain this suit because the statutory methods of collecting the deficiency assessment were exclusive, and (6) that the statutory methods should have been first exhausted before resorting to a bill to cancel these conveyances.

The Court rendered a decree on March 3, 1934, granting relief and cancelling the deeds, and ordering the property sold to satisfy the assessment, subject to the payment of $2,000.00, out of the proceeds of the sale, to Leila Zimmern in satisfaction of the homestead conveyed to her (R. 54-57).

Prior to May 11, 1934, Mrs. Zimmern filed a petition for a rehearing attacking the decree because it did not secure her right of dower (R. 83-86, 57).

The court thereafter, pursuant to said petition, on August 13, 1934, amended the former decree by adding thereto paragraph No. 9, which modified the previous decree so that the property should be sold subject to right of dower of Leila Zimmern (R. 60-61).

Thereafter, petitioners separately and severally, filed applications for appeals and assignments of errors on November 10, 1934 (R. 61-70). The said District Court on

December 3, 1934, granted a severance as to Bernice L. Levinsohn, who declined to join in the appeals, and allowed the appeals prayed for from the decree of March 3, 1934, and the amendments of August 13, 1934, *in forma pauperis* to the United States Circuit Court of Appeals, Fifth Circuit, the said Appellants having duly filed affidavits of their inability to pay or secure the payment of the costs of said appeal (R. 72-73).

Whereupon, the Appellee filed a motion to dismiss the appeals upon the grounds that they had not been taken within three months from the date of the original decree of March 3, 1934, and that the petition of Leila Zimmern for a rehearing did not suspend the decree (R. 74-77).

The cause was duly submitted on October 23, 1935, to the said Circuit Court of Appeals, upon said motion to dismiss and upon the merits (R. 79).

Thereafter, on November 14, 1935, the said Circuit Court of Appeals rendered a decree dismissing said appeals pursuant to said motion to dismiss, but did not pass upon the merits (R. 79-80).

Your Petitioners, separately and severally, filed in said Circuit Court of Appeals on December 3, 1935, motions for rehearing and to revoke the submission of said cause (R. 81-88).

The said Circuit Court of Appeals, on to wit, January 16, 1936, denied said motions and petitions for rehearing (R. 89-93).

It is believed that these rulings of the United States Circuit Court of Appeals bring the cause within the provisions of said Section 347, Title 28, U. S. C. A.

4. The cases believed to support the jurisdiction of the Court are as follows, viz:

a. The decision of the said United States Circuit Court of Appeals is a decision of a Federal question in a way

probably in conflict with applicable decisions of this Court. *Kingman & Co.* v. *Western Mfg. Co.*, 170 U. S. 675; *International Trust Co.* v. *Weeks*, 193 U. S. 667; *Cherokee Nation* v. *Whitmire*, 223 U. S. 111; *United States* v. *Ellicott*, 223 U. S. 524; *Aspen Mining & S. Co.* v. *Billings*, 150 U. S. 31; *Morse* v. *United States*, 270 U. S. 151.

b. The decision of the said Circuit Court of Appeals that the time within which an appeal might be taken, began to run from March 3, 1934, the date of the original decree, rather than August 13, 1934, the date of the amended decree, is in conflict with the weight of authority. *In re Potter* (Cal.), 74 Pac. 986; *Hayes* v. *Silver Creek, etc., Co.* (Cal.), 68 Pac. 704; *Johnson* v. *Foreman*, 24 Ind. App. 93, 56 N. E. 254; *Billson* v. *Lardner*, 67 Minn. 35, 69 N. W. 477; *Hall* v. *Read*, 28 Tex. Civ. App. 18, 66 S. W. 809; *Partridge* v. *Wooten* (Tex. Civ. App.), 137 S. W. 412; *Vincent* v. *Vincent*, 14 D. C. 320; 3 *Corpus Juris* 1059, Sec. 1058, 1050, Sec. 1047.

c. The decision of said Circuit Court of Appeals so far departs from the accepted and usual course of procedure as to call for this Court's power of supervision. *Morse* v. *United States*, 270 U. S. 151.

d. This case involves questions of public importance which it is in the public interest to have decided by this Court of last resort. *Magnum Import Co.* v. *Coty*, 262 U. S. 159.

III.

Statement of the Case.

The case has already been stated under II Division, Section 2, to which reference is now made.

IV.

Specification of Errors.

The said Petitioners, separately and severally, specify the following errors, separately and severally.

1. The Court erred in rendering its decree dismissing said appeals (R. 79-80).

2. The Court erred in holding that the petition for a rehearing, filed by Leila Zimmern in the District Court prior to May 11, 1934, did not toll the time for taking these appeals to said Circuit Court of Appeals until said motion had been disposed of on August 13, 1934 (R. 89-93).

3. The Court erred in holding that the petition for a rehearing, filed by said Leila Zimmern in the said District Court prior to May 11, 1934, did not toll the time in which she, the said Leila Zimmern, might take her appeal to said Circuit Court of Appeals (R. 89-93).

4. The Court erred in holding that the time for taking their respective appeals began to run from March 3, 1934, the date of the original decree, instead of August 13, 1934, the date of the amended decree (R. 89-93).

V

ARGUMENT.

The argument in support of this application for a writ of certiorari to the United States Circuit Court of Appeals may be summarized under two main propositions.

A. The filing by Leila Zimmern, of a petition for a rehearing in the District Court, tolled the time for taking her appeal until that petition had been acted upon by the District Court; that petition was disposed of on August 13,

1934. Where a petition for a rehearing is seasonably filed in the trial court, the time for taking an appeal does not begin to run until that petition has been disposed of. In this case the petition of Leila Zimmern for a rehearing was disposed of on August 13, 1934. Her appeal was taken within three months from that date and was taken in due time.

B. The filing by Leila Zimmern, of a petition for a rehearing in the District Court, tolled the time for taking all appeals until that petition was disposed of on August 13, 1934. The rule has long been established that where a petition for rehearing is seasonably made or presented and entertained by the court, the time limited for appellate review does not begin to run until the motion has been disposed of.

C. The time within which the appeals might be taken to the said Circuit Court of Appeals began to run from August 13, 1934, the date upon which the original decree of March 3, 1934, was amended, and the appeals were taken within three months from said date of August 13, 1934.

A.

The rule is well established that if a "petition for a rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the * * * petition has been disposed of." *The Aspen Mining & S. Co.* v. *Billings,* 150 U. S. 31; *Kingman* v. *Western Mfg. Co.,* 170 U. S. 675; *United States* v. *Ellicott,* 223 U. S. 524; *Morse* v. *United States,* 270 U. S. 151; *Northern Pac. Co.* v. *Holmes,* 155 U. S. 137; *Tex. & Pac. R. Co.* v. *Murphy,* 111 U. S. 488; *Marker's Federal Appellate Jurisdiction and Procedure,* Sec. 142.

Now the record discloses that Leila Zimmern filed a petition for a rehearing in the District Court, prior to May 11, 1934 (R. 83-86). Such was the assumption of the Court of Appeals in its opinion denying the motions for rehearing (R. 89-93).

It is true that the prayer of this petition is "for a rehearing, to the extent of modifying the decree of sale so as to refer exclusively to her husband's interest in this property and not to include her dower interest" (R. 86). The Circuit Court of Appeals held that this petition did not suspend the decree of March 3, 1934.

It is, however, respectfully submitted that the petition pointed out a substantial defect in the decree. Under the original decree the property described therein would have been sold free from any claim of dower. That is its plain construction. But so long as Mrs. Zimmern's petition was undisposed of, the property could not be sold. For the term of the sale, in part, depended upon the disposition of her petition. The clerk of the court could not make the sale until he knew whether it should be sold subject to, or free from, dower. The inevitable effect of this petition was to suspend the execution of the decree until the court acted upon the petition.

The purpose of the petition for a rehearing was to have the decree opened for the purpose of amending it. It is of no consequence that the petition did not ask to have the entire decree set aside. It is the opening of the decree, rather than the purpose for which it is opened, that operates to toll the time for taking the appeal. *Brackett* v. *Brackett,* 2 How. 238.

A decree in equity may, and usually does, adjudicate more than one issue. Opening the decree for the purpose of rehearing the cause on one of these issues is as effective to toll the time for taking an appeal, as a rehearing upon all of the issues.

It is, therefore, respectfully submitted that the time within which Leila Zimmern might appeal, began to run from the date upon which her petition was acted upon, viz, August 13, 1934. Her appeal was taken within three months from that date and the Circuit Court of Appeals had jurisdiction of her appeal.

It is also submitted that when the decree is opened at the instance of one party and its operation suspended, it is opened, and its effect suspended, as to all of the parties. It does not become final for the purpose of an appeal as to any of the others until the petition for a rehearing has been acted upon. Consequently, the appeals of all of the parties being taken within three months from August 13, 1934, are within the jurisdiction of the Court of Appeals.

Furthermore, if it were a matter of doubt that the decree of March 3, 1934, did not become final for the purpose of an appeal until August 13, 1934, that doubt should be resolved in favor of the right to maintain these appeals. *McGourkey* v. *Toledo & O. C. R. Co.*, 116 U. S. 536.

B.

The record, furthermore, gives rise to the presumption that motions for rehearing were duly filed by all of the petitioners and tolled the time for taking the appeals until August 13, 1934.

The decree of August 13, 1934, amending the decree of March 3, 1934, recites the following:

> "this matter coming on further to be heard on motion of respondents for a rehearing of the decree entered on the 3rd day of March, 1934, and being submitted on such motion, and having been argued in open Court and it appearing to the Court that the lands mentioned and described, and ordered to be sold in said final decree, of March 3, 1934, should be sold subject to the dower rights of the respondent, Leila Zimmern" (R. 60).

Where a motion for a new trial "was entertained by the Court, argued by counsel without objection, and passed upon, it must be presumed that it was regularly and properly made". *Kingman & Co.* v. *Western Mfg. Co.*, 170 U. S. 675; *Tex. & Pac. R. Co.* v. *Murphy*, 111 U. S. 488.

It does not expressly appear when this motion by the respondents was filed. But it was entertained by the Court and an order was made on it. Applications for appeals were presented to the Court and allowed by it. "The presumption is, therefore, in the absence of anything to the contrary, that it was filed in time to give the Court control of the judgment which had been entered, and jurisdiction to enforce any order that might be made". *Tex. & Pac. R. Co.* v. *Murphy*, 111 U. S. 488. The allowance of the appeals by the District Court (R. 72-73), in conjunction with the amending decree of August 13, 1934 (R. 60), raises the presumption that the time for taking the appeals had been tolled by the due filing of petitions for rehearing.

C.

The rule seems to be well established that where a decree has been substantially amended the time for taking an appeal runs from the date of the amended decree. *In re Potter* (Cal), 74 Pac. 986; *Hayes* v. *Silver Creek, etc., Co.* (Cal), 68 Pac. 704; *Spencer* v. *Troutt* (Cal), 65 Pac. 1083; *Johnson* v. *Foreman* (Md), 56 N. E. 254; *Billson* v. *Lardner* (Minn), 69 N. W. 477; *Hall* v. *Read* (Tex), 66 S. W. 809; *Henry* v. *Boulter* (Tex), 63 S. W. 1056; 3 *Corpus Juris* 1050, Sec. 1047.

This amendment was not merely clerical; it was not *nunc pro tunc*. It was a matter of substance and it affected the entire decree of March 3, 1934, but especially Par. 4 (R. p. 56), which provided for the sale of the lands described in the bill of complaint. The amendment would have become a part of the terms of any sale of said lands.

Whether the lands be sold free from, or subject to, Mrs. Zimmern's right of dower would have an important effect upon the bids that might be offered for these properties. It would affect vitally the price at which these lands could be sold. The determination of this issue was important, not only to Mrs. Zimmern, but it affected substantially the rights of all of the parties to this litigation. It would have an influence upon the amount the United States would be able to collect. It might be important in determining whether there would be a deficiency decree over against Samuel Zimmern. By the assertion of Mrs. Zimmern's right of dower, the other respondents might be deprived of an opportunity to receive any benefit from the property. For the deeds being valid as between the parties, if anything should remain over after paying the United States, the excess should be paid over to the grantees.

It is submitted therefore that the United States Circuit Court of Appeals, Fifth Circuit, had jurisdiction to hear these appeals on the merits.

We respectfully ask that a writ of certiorari be directed, to that Court requiring it to send up the record to the end that full and complete justice may be done.

Respectfully submitted,

LAWRENCE KOENIGSBERGER,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1935.

No. 766

SAMUEL ZIMMERN ET AL.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

LAWRENCE KOENIGSBERGER,
Attorney for Petitioners.

JESSE F. HOGAN,
NORMAN H. RATTNER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 766

LEILA ZIMMERN, SAMUEL JOSEPH ZIMMERN, JR., JANICE ZIMMERN AND SAMUEL ZIMMERN,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

We respectfully request the Court to consider the brief filed in support of the application for certiorari herein, as supplemented by this brief, as the briefs for the petitioners.

On page 16 of the former there is an error in the citation to *McGourkey* v. *Toledo and O. C. R. Co.*, which is to be found in 146 U. S. 536, and not in 116 U. S., as therein cited.

D.

The Filing by Samuel Zimmern of His Petition for Rehearing Extended the Time for Appeal of All of the Petitioners.

The amended petition for rehearing on the part of Samuel Zimmern, filed August 11, 1934, will be found on pp.

58-60 of the Record. The exact date upon which his original petition for rehearing was filed does not appear in the Record. This was thought to be unnecessary in making up the Record on appeal to the Circuit Court of Appeals, as no objection had been interposed in the District Court either to the filing or consideration of the amended petition for rehearing or to the petitions for appeal of any of the appellants (R. 61, 65, 67), or to the allowance of the appeal (R. 72).

However, it is plainly to be inferred from the Record that the original petition of Samuel Zimmern for rehearing was seasonably filed. On May 11, 1934, less than three months after the date of the original decree, which had been entered on March 3, 1934, and within the November term at which such decree was entered, the District Court extended the term for ninety days "in which time *all matters and orders in connection with this cause* and the amendments of the decree may be entered" (R. 57).

The amended petition for rehearing was filed on August 11, 1934 (R. 58), and was acted on by the District Court at the same time as the petition of Leila Zimmern, as appears from the order of the District Court of August 13, 1934, which recites that the matter came on to be further heard on motion of respondents for a rehearing, and, after amending the decree in accordance with the petition of Leila Zimmern, ordered that as to all other matters and on all further grounds "the said motion for rehearing is denied" (R. 61). The latter part of this order obviously referred to the petition of Samuel Zimmern, as the petition of Leila Zimmern was granted in respect of all of the matters embraced thereby (R. 84-87). Therefore, in passing its decree denying a rehearing on August 13, 1934, the Court must have been also passing on the merits of Samuel Zimmern's amended petition for rehearing.

The various circumstances above set forth bring the case within the rule that where a motion for a new trial was entertained by the Court, argued by counsel without objection, and passed upon, it must be presumed that it was regularly and properly made.

Kingman Company v. *Western Manufacturing Co.*, 170 U. S. 675, 678.

Texas Pac. R. Co. v. *Murphy*, 111 U. S. 488.

Furthermore, even if no petition had been filed by Samuel Zimmern prior to August 11, 1934, upon which date the amended petition was filed, the filing of the petition on that date in itself would have been sufficient to extend the time for appeal, in view of the order of May 11, 1934, extending the term of Court for ninety days for all purposes (R. 57).

Assuming, then, that a petition for rehearing was seasonably filed by Samuel Zimmern, there remains to be considered the question of whether the filing of such petition operated to extend the time for appeal of the other appellants, and we respectfully submit that it did. As will appear by reference to his amended petition for rehearing, he sought thereby to reopen the entire case (R. 58-60).

As stated in the brief to which this is supplemental, this was a suit in equity by the United States, as a creditor of Samuel Zimmern, in respect of Federal income taxes, seeking to set aside certain conveyances of real estate by him to the other respondents, who were joined with him as defendants in the District Court. Samuel Zimmern was a necessary party to the suit. The United States was not a judgment creditor, nor had it taken the steps necessary to acquire a lien, i. e., causing the amount of the tax to be placed on the assessment list in the hands of the Collector of Internal Revenue (R. 2-10), as required by 26 U. S. C. (1925), Sec. 115, as follows:

"*115. Lien for Taxes.*—If any person liable to pay any tax neglects or refuses to pay the same after de-

mand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person. * * *"

Samuel Zimmern, as the alleged debtor and alleged fraudulent grantor, was a necessary party to the suit.

Swan Land and Cattle Company v. *Frank,* 148 U. S. 603, 610.

Ozan Lumber Company v. *Davis Sewing Machine Co.,* 283 Fed. 436.

Allen v. *House,* 290 Fed. 253.

Cleveland Worsted Mills Co. v. *Consolidated Textile Corporation,* 292 Fed. 129.

This is so even in those cases where the creditor has a judgment, as it is the debtor's obligation which it is sought by the suit to collect, his insolvency which is to be established, and his fraudulent conduct that requires investigation.

Gaylord v. *Kelshaw,* 68 U. S. 81.

Being thus a necessary party to the litigation, he was a necessary party to the appeal, which could not have been prosecuted without joining him as an appellant, except after summons and severance or equivalent proceeding. One of the reasons for this is so that the appellate tribunal shall not be required to decide twice or three times the same question on the same record.

Hardee v. *Wilson,* 146 U. S. 179, 181.

Masterson v. *Howard,* 77 U. S. 416.

In re Mussina, 61 U. S. 280.

Samuel Zimmern could not take an appeal while his petition for rehearing was pending; if he had done so, his action would have been a nullity.

Voorhees v. *Noye Mfg. Co.*, 151 U. S. 135, 137.

Thus none of the defendants could have taken an appeal until Samuel Zimmern's petition for rehearing had been disposed of, because Samuel Zimmern could not have taken it under the principle of *Voorhees* v. *Noye Mfg. Co.*, 151 U. S. 135, *supra;* and if the other defendants had simply taken an appeal without joining Samuel Zimmern therein, their appeal would have been dismissed for want of proper parties thereto. If they had proceeded against Samuel Zimmern, by summons and severance, or otherwise, his answer would have been that he could not join in the appeal while his petition for rehearing was pending, nor refuse to join in the appeal because to do so might be a waiver of his rights to appeal at all, upon the ground that the Appellate Court will not consider two appeals on the same record.

Masterson v. *Howard*, 77 U. S. 416, *supra.*

Hardee v. *Wilson*, 146 U. S. 179, *supra.*

Thus, if the appeal had been taken by the other respondents while Samuel Zimmern's petition for rehearing was pending, Samuel Zimmern would have lost his right to appeal in the event of a denial of his petition; and, if the decision of the Circuit Court of Appeals herein is correct, the other respondents, by waiting until Samuel Zimmern's petition for a rehearing had been acted on, lost their right of appeal.

It would follow that in a situation such as that here presented, the parties are caught in a procedural snare from which they cannot escape, with consequent deprivation of their right of review by the Circuit Court of Appeals. We respectfully submit that such a conclusion and unfortunate result should not be reached unless the Court is irresistibly

forced thereto; that such result can only be arrived at by an application of procedural rules never heretofore enunciated, and that a logical method of reasoning will lead to the conclusion that the time of all the parties for the taking of their appeal commenced to run when the petition of Samuel Zimmern for a rehearing was denied.

Conclusion.

In conclusion it is submitted:

1. That the time within which Leila Zimmern was required to take her appeal was suspended both by her own application for an amendment of the decree and by the pendency of the application of Samuel Zimmern for a rehearing.

2. That the time of Samuel Zimmern for the taking of his appeal was suspended both by the pendency of his application for a rehearing and the pending application of Leila Zimmern for amendment of the decree.

3. That the time of Samuel Joseph Zimmern, Jr., and Janice Zimmern for the taking of their appeal was suspended by the pending application of Leila Zimmern for an amendment of the decree and the pendency of the application of Samuel Zimmern for rehearing.

4. That the action of the Circuit Court of Appeals for the Fifth Circuit in dismissing the appeal for want of jurisdiction should be reversed.

Respectfully submitted,

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No. 766

In the Supreme Court of the United States

OCTOBER TERM, 1935

SAMUEL ZIMMERN ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Alabama, which deals only with the merits and not with the question of jurisdiction (R. 51–53) was rendered March 1, 1934, and has not been reported. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, which deals only with the question of jurisdiction (R. 79–80) was rendered November 14, 1935, and is reported in 79 F. (2d) 703. The opinion of the same Circuit Court of Appeals on the

denial of the motion for rehearing (R. 89–93) was rendered January 16, 1936, and has not yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered November 14, 1935 (R. 80–81). Petitions for rehearing (R. 81–87) and motion to revoke dismissal (R. 87–88) were filed December 3, 1935 and were denied January 16, 1936 (R. 93).

Petition for writ of certiorari was filed February 20, 1936 (R. 95) and was granted March 2, 1936 (R. 95).

The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioners' appeals to the Circuit Court of Appeals were taken within the period allowed by Section 8 (c) of the Act of February 13, 1925.

STATUTE AND RULES INVOLVED

The only statute involved is Section 8 (c) of the Act of February 13, 1925, c. 229, 43 Stat. 940 (U. S. C., Title 28, Sec. 230), which provides as follows:

> No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly

made within three months after the entry of such judgment or decree.

The Federal equity and local District Court rules involved will be found in the Appendix.

STATEMENT

On October 15, 1929, the United States filed in the United States District Court for the Southern District of Alabama a bill in equity against Samuel Zimmern, his wife and their three children (R. 2–12). The bill, as subsequently amended (R. 12–13), alleged that Samuel Zimmern owed the United States $53,236.51 on account of income taxes for the year 1920 (R. 4; cf. R. 26–27); that, at a time when the taxes were an existing liability, and without receiving any consideration, Samuel Zimmern had first conveyed to his wife his interest in a dwelling house and lot at 1116 Government Street, Mobile, Alabama (R. 5–6, 12) and had then joined with his wife in conveying to their children their interest in land on Royal Street in the same city (R. 6–8, 12–13); and that these conveyances left Samuel Zimmern without assets from which this tax liability can be collected (R. 6, 8). The bill prayed that these two conveyances should be declared fraudulent and set aside, and that the "property transferred *by the defendant*[1] [Samuel Zim-

[1] It is important to note that the bill did not pray that the interest transferred by Samuel Zimmern's wife, Leila, be charged with a trust. From the first it was clear that the United States was not trying to reach Leila's dower interest in the lands in controversy.

mern] *to his wife* and to his children as described in this bill be charged with a trust in favor of the complainant in the sum of $53,236.51."

After an answer had been filed [2] (R. 13–15) and amended (R. 15–20), and after evidence had been taken (R. 23–51), the District Judge rendered an opinion (R. 51–53) holding that the conveyances were fraudulent and should be set aside and that "the prayer of the bill should be granted" [3] (R. 53).

On March 3, 1934, the District Court made what the Court itself styled a "Final Decree." (R. 54–57.) The decree consisted of 8 numbered paragraphs which respectively adjudged that (1) Samuel Zimmern is indebted to the United States for certain named sums; (2) Samuel Zimmern's conveyance of the Government Street property is set aside; (3) the joint conveyance by Samuel Zimmern and his wife of the Royal Street property is set aside; (4) "the two above described parcels of land * * * be sold by the United States Marshal" at public sale; (5) out of the proceeds of the sale of the Government Street property $2,000 be

[2] The petitioners did not challenge the existence of the tax liability (R. 14, paragraph 3), but contended that the conveyances in question should not be deemed fraudulent because they were made for consideration and because, even after the conveyances, Samuel Zimmern had assets left sufficient to satisfy his existing obligation to the United States (R. 13–20).

[3] Nowhere in the petitioner's answer, or the evidence, or the District Court's opinion, is reference made to the dower interest of Mrs. Leila Zimmern.

paid to Leila Zimmern in lieu of homestead exemptions; (6) subject to the $2,000 homestead claim, a trust be declared on the proceeds in favor of the United States for the amount of its tax claim; (7) in the event the proceeds are insufficient to meet the tax claim, execution issue against Samuel Zimmern's other property; and (8) in the event Samuel Zimmern's wife and children fail to note in the county record book that their deeds have been cancelled, the Clerk of the District Court shall so note.

The District Court on May 11, 1934, extended the November Term, 1934, which otherwise would have expired on May 28, 1934, to ninety days from that date, that is, to August 26, 1934 (R. 57). On August 11, 1934, Samuel Zimmern, alone of the petitioners, filed a paper which he designated as an "Amended Petition of Defendant for Rehearing", and which represents that the District Court decided contrary to the evidence and without awaiting the testimony of a material witness (R. 58–60). This petition did not represent that error was committed with respect to Mrs. Leila Zimmern's dower interest.

On August 13, 1934, the District Court made an "Order Amending Final Decree" (R. 60–61). This order did not repeat the eight numbered paragraphs of the original decree but merely added a ninth paragraph decreeing that the lands ordered

to be sold by that earlier decree "be sold subject to any dower rights of the respondent Leila Zimmern" (R. 61).

Petitions for appeal from the decree and "the amendment thereof" were filed November 10, 1934, by Samuel Zimmern (R. 61–62), his wife, Leila Zimmern (R. 65), and two of their children, Samuel Joseph Zimmern, Jr., and Janice Zimmern (R. 67–68). Berenice L. Levinsohn, the other child of Samuel and Leila Zimmern, who had been joined as a respondent in the District Court, refused to join in the appeal (R. 68). The District Court granted the present petitioners (who had been respondents in the District Court) a severance against Berenice L. Levinsohn and the right to appeal (R. 72–73). Each of them filed an assignment of errors relating solely to the original decree of March 3, 1934 (R. 62–64; 65–67; 68–70).

In the Circuit Court of Appeals the United States moved to dismiss the appeals on the ground that, the appeals not having been applied for in time, to wit, within three months of March 3, 1934, the court had no jurisdiction (R. 74–77). On November 14, 1935, the Circuit Court of Appeals rendered an opinion holding that it was without jurisdiction of the appeals (R. 79–80), and therefore dismissed them (R. 80–81). All the appellants filed a petition for rehearing (R. 81–87) and the appellant Leila Zimmern, in addition, moved to revoke the dismissal (R. 87–88). Attached to

this petition for rehearing in the Circuit Court of Appeals was a copy of a document (R. 84–87) not theretofore in the record, but alleged to be itself an earlier "Petition for Rehearing" that had been "*presented* to the Judge" of the *District Court* prior to May 11, 1934 (R. 83). The appellants urged that the time for appealing from the District Court did not commence to run until this document was acted upon, which was alleged to have occurred on August 13, 1934 (R. 82–83).

The Circuit Court of Appeals on January 16, 1936, rendered an opinion (R. 89–93) and entered an order (R. 93) denying the petition for rehearing and the motion to revoke dismissal.[4]

---

[4] Read with extreme literalness, the order of the Circuit Court of Appeals merely denies "the petition for rehearing." But it appears from its opinion that the court treated Mrs. Leila Zimmern's so-called "motion to revoke dismissal" as the equivalent of a petition for rehearing, and denied it (R. 89, third paragraph of the opinion; R. 90; R. 91). This construction of the court's action corresponds with the construction by the petitioners in their motion for an order staying the mandate where they state that the Circuit Court of Appeals has denied both "petitions' (sic) for rehearing." (R. 93.)

The point is in any event immaterial. The decree of November 14, 1935, is the only order here under review (Petition for Writ of Certiorari, p. 8, II, 1), or as to which review could be had. Errors cannot be assigned to, or review had of, an order denying a motion for a rehearing because the disposition of such motion is discretionary. *Luckenbach Steamship Co.* v. *United States*, 272 U. S. 533, 535; *Kingman & Co.* v. *Western Mfg. Co.*, 170 U. S. 675, 680; *Texas and Pacific Railway Co.* v. *Murphy*, 111 U. S. 488, 489.

A petition for certiorari seeking a review only of the decree of November 14, 1935 (Petition for Writ of Certiorari, p. 8) was filed on February 20, 1936, and was granted on March 2, 1936 (R. 95).

SUMMARY OF ARGUMENT

The only question in this case is whether the Circuit Court of Appeals erred in adjudging that the applications for appeal to it of a decree entered March 3, 1934, by the District Court were not timely taken. To show that the appeals were timely taken, the petitioners rely upon a so-called petition for rehearing of Mrs. Leila Zimmern, a so-called amended petition for rehearing filed by Mr. Samuel Zimmern, and an addition to the decree made by the District Court's order of August 13, 1934.

Mrs. Leila Zimmern's petition for rehearing cannot be considered because it is not in the record; and its existence or timely filing cannot be presumed from what is in the record or from an affidavit offered in the Circuit Court of Appeals after the appeal had been dismissed. *Hudgins* v. *Kemp,* 18 How. 530, 534–535. Even if the document were in the record, it is not the sort of petition for rehearing which extends the time for appeal, but is only an application for a clarifying amendment as to a point not in issue between the parties. *Larkin Packer Co.* v. *Hinderliter Tool Co.,* 60 F. (2d) 491 (C. C. A. 10th).

Mr. Samuel Zimmern's amended petition for rehearing did not enlarge the appeal time because when it was filed "the right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing." *Conboy* v. *First National Bank,* 203 U. S. 141, 145.

Nor was the time for appealing from the decree of March 3, 1934, revived by the amendment made on August 13, 1934, after the right to appeal from the decree had expired. This amendment, made at the petitioners' request, to benefit them, and to clarify a formal slip which could, at their option, have been remedied in ways other than by amendment, did not create a new right of appeal. *Better Packages, Inc.* v. *L. Link & Co.,* 74 F. (2d) 679, 680–681 (C. C. A. 2d); *Stradford* v. *Wagner,* 64 F. (2d) 749, 751 (C. C. A. 10th).

ARGUMENT

Introductory

The only question presented in this case is whether the Circuit Court of Appeals erred in adjudging that the applications for appeal to it from the District Court were not timely made.

The final decree of the District Court was entered on March 3, 1934 (R. 54–57). Unless some significant proceedings occurred thereafter in the District Court, an application for an appeal had to "be duly made within three months after the entry of such

* * * decree," that is, by June 3, 1934. Section 8 (c) of the Act of February 13, 1925, c. 229, 43 Stat. 940 (U. S. C., Title 28, Sec. 230). This principle is, of course, admitted by the petitioners, but they claim that three significant proceedings did occur in the District Court after March 3, 1934, and that each of these proceedings enlarged the time for appealing to the Circuit Court of Appeals.

First, the petitioners contend that within three months after the original decree of the District Court one of them, Mrs. Leila Zimmern, filed a petition for rehearing in the District Court; that such filing suspended both for her (Petition for Certiorari, p. 12, IV, 3; p. 12, V, A) and for all other parties (Petition for Certiorari, p. 12, IV, 2; p. 13, V, B) the time for taking an appeal; and that the time within which the proceeding to review might be initiated began to run from the date of the denial of such petition. Second, they contend[5] that Samuel Zimmern's petition for rehearing, although filed more than three months after the original decree of the District Court, gave both to him and to all other parties a new right of

[5] It is not clear that the petitioners can make this second contention. They did not specifically urge it either in the Circuit Court of Appeals (R. 77–79; 81–87; 87–88) or in their Petition for Certiorari to this Court (Petition, p. 12, "Specification of Errors"). However, since the point was in the record in the lower court (R. 75, No. 6), was considered by that court (R. 79–80), and may be embraced in the general specifications of error by the petitioner (Petition for Certiorari, p. 12, IV, 1), this brief considers the contention.

appeal, and that the time within which the proceeding to review might be initiated began to run from the denial of such petition. Third, they contend that the addition made to the final decree by the District Court's order of August 13, 1934, had the effect of reviving the right (which had theretofore expired) to appeal from the final decree itself.

The Government submits that none of these contentions is valid, and, moreover, that the first contention cannot be considered since it is based on matter dehors the record.

I

Mrs. Leila Zimmern's So-Called Petition for Rehearing Did Not Enlarge the Time for Appealing From the Decree of March 3, 1934

The petitioners' main reliance is upon Mrs. Zimmern's so-called petition for rehearing. They contend that this document calls for an application of the well-settled rule [6] that where a petition for rehearing is seasonably filed, the time for an appeal does not begin to run until after the petition is denied.

A. THE PETITION FOR REHEARING IS NOT IN THE RECORD

To this contention the Government's first answer is that since the document does not appear in the

[6] *Brockett* v. *Brockett*, 2 How. 238; *Texas and Pacific Ry. Co.* v. *Murphy*, 111 U. S. 488; *Aspen Mining & S. Co.* v. *Billings*, 150 U. S. 31; *Kingman & Co.* v. *Western Mfg. Co.*, 170 U. S. 675; *Morse* v. *United States*, 270 U. S. 151.

record it cannot be referred to as a means of sustaining the jurisdiction of the Circuit Court of Appeals. That court has jurisdiction of a case only if the record affirmatively shows that an appeal was taken to it in the time allowed by law. *George* v. *Victor Talking Machine Co.*, 293 U. S. 377, 379; *Exporters of Manufacturers' Products* v. *Butterworth-Judson Co.*, 258 U. S. 365, 369; *Dang Nam* v. *Bryan*, 78 F. (2d) 720 (C. C. A. 9th); *In re Torgovnick*, 49 F. (2d) 211, 212 (C. C. A. 2d). And in this case the record does not show that within three months after the decree was entered an appeal was taken or a petition for rehearing was filed by Mrs. Leila Zimmern or anyone else. Indeed the petitioners in their own praecipe for transcript of record (R. 1), as amended with their consent (R. 2) did not request the clerk to include any petition by Mrs. Leila Zimmern.

B. THE PETITION CANNOT BE SUPPLIED BY PRESUMPTION FROM OTHER PARTS OF THE RECORD.

But the petitioners suggest that though the petition for rehearing is not in the record, this Court should presume that the petition did exist and was seasonably filed. For this proposition they cite [7]

[7] The petitioners also cite *Kingman* v. *Western Mfg. Co.*, 170 U. S. 675, 678. There the motion for a new trial was in the record and was seasonably filed. The questions were whether the trial judge had given counsel leave to file, and whether the motion was regularly and properly made. It was said that "no leave to file it was required" and "it must be presumed that it [the motion] was regularly and properly made." (170 U. S. at 678.)

Texas and Pacific Ry. Co. v. *Murphy,* 111 U. S. 488, 489. There a petition for rehearing actually appeared in the record, but the particular date on which it was filed was inadvertently omitted. This Court, after examining other corroborative parts of the record, presumed that the petition was timely filed.

That presumption relating only to the date of a document admittedly in the record has no application here; and we submit that a new presumption as to the very existence of a document should not be invented to cover the facts of this case. Indeed we believe that there are no facts in this record to which such a presumption, if it were invented, could properly be applied.

The petitioners, however, argue that there are facts upon which a presumption could be based, and they specifically refer to the District Court's Order Extending Term of Court (R. 57); the District Court's Order Amending Final Decree (R. 60–61); and the District Court's Order Allowing Appeal (R. 72–73). None of these seems to the Government adequate to support a presumption that Mrs. Zimmern's petition existed and was filed on time.

The Order Extending Term of Court was filed May 11, 1934 (R. 57). It recites that "*for good reason shown* it will be necessary to modify or amend said decree" and it then extends the term for ninety days "in which time all matters and orders

in connection with this cause and the amendments of the decree may be entered." We find it difficult to see how this order furnishes a basis for presuming that a petition for rehearing had been already filed. The recital that "good reason" has been shown seems to indicate that it was shown orally. (See Affidavit of Honorable Robert T. Ervin, Appendix, pp. 34–42, and discussion, pp. 17–18 *infra*) and not by motion, for if a motion had been made, reference would undoubtedly have been made to it in accordance with the customary practice. (Cf. R. 75.) Furthermore, the order is more nearly repugnant to, than consistent with, the idea that a petition for rehearing had already been filed. For, if a petition for rehearing had already been filed, the parties would have been "bound to follow the petition thus pending to the next term" and an extension of the term would have been unnecessary. *Aspen Mining and Smelting Co.* v. *Billings*, 150 U. S. 31, 36.

The District Court's Order Amending the Final Decree (R. 60–61), filed August 13, 1934, is no more helpful in laying a basis for any presumption of prompt filing of Mrs. Leila Zimmern's petition. Inasmuch as this order was not entered until August 13, 1934, a mere recital that a petition for rehearing had theretofore been filed does not justify an inference that the petition was filed as early as June 3, 1934, the date on which the time for ap-

pealing from the decree of March 3, 1934, would ordinarily expire.[8]

The third part of the record to which the petitioners point as laying a foundation for the presumption they invoke is the Order Allowing Appeal (R. 72–73) filed December 3, 1934. This order does not refer to any petition for rehearing. It is cited apparently on the theory that the District Judge would not have allowed an appeal unless he knew that the appeal was timely taken. To this the short answer is that the books are too full of cases where trial judges have erroneously allowed appeals, for this Court to assume that the allowance of an appeal, without anything more, justifies an inference that the application to the trial judge was timely made.

C. THE PETITION WAS NOT MADE A PART OF THE RECORD BY PROCEEDINGS IN THE CIRCUIT COURT OF APPEALS

If Mrs. Leila Zimmern's petition for rehearing cannot be brought into the record by presumption, it is even clearer that it cannot be brought there by

[8] The terms of this Order Amending the Final Decree are so ambiguous that they lead to conflicting inferences. The order consistently refers to a motion of respondents for rehearing. The use of the singular in describing the "motion" implies that the only document before the court was Samuel Zimmern's Amended Petition for Rehearing (R. 58–60). On the other hand, the use of the plural in describing the "respondents" implies that there was before the court a document in addition to the "Amended Petition" submitted by Samuel Zimmern alone.

any proceedings which occurred in the Circuit Court of Appeals.

In that court, after the appeal had been dismissed (R. 80–81), all the petitioners joined in a petition for rehearing (R. 81–87), and, in addition, Mrs. Zimmern made a motion to revoke dismissal[9] (R. 87–88). Attached to the joint petition for rehearing in the Circuit Court of Appeals, and incorporated in both documents by reference, was Mrs. Leila Zimmern's so-called petition for rehearing in the District Court (R. 84–87). This petition for rehearing and what was attached thereto cannot be considered in this Court, not only because they are subsequent to, and not affected by, the decree of November 14, 1935, the only decree here under review (Petition for Certiorari, p. 8, II, 1), but also because affidavits attached to a petition for rehearing in a lower court are not a part of the

[9] In her motion to revoke dismissal, Mrs. Zimmern also suggested that the Circuit Court of Appeals allow her time to take steps to request "the lower [i. e., District] Court to correct its record by making her petition for a rehearing in said Court a part of the record and then have the corrected record brought up by a writ of certiorari" (R. 88). If this informal request may be considered as the equivalent of a formal suggestion of diminution of the record and motion for certiorari, and if it be assumed that the motion was denied (R. 92, lines 3–5), nonetheless this denial is not reviewable, both because in the petition for certiorari it was not specified as error and because it was a discretionary, non-reviewable ruling. *Hyde* v. *Shine*, 199 U. S. 62, 85. See footnote 4 on page 7, *supra*. Moreover, it is obvious that the denial of the motion did not make the subject-matter of the motion part of this record.

record. *Hudgins* v. *Kemp.*, 18 How. 530, 534–535; *Stewart* v. *Wyoming Ranche Co.*, 128 U. S. 383, 390; *Evans* v. *Stettnisch*, 149 U. S. 605, 607.

D. THE PETITION CANNOT NOW BE MADE A PART OF THE RECORD BY A NUNC PRO TUNC ORDER.

There is no suggestion by the petitioners that this Court should now either amend the record or stay proceedings to allow some other court to amend the record. But if such a suggestion had been or were to be made it could not succeed.

The reason that the so-called petition for rehearing is not in the record is not because of misprision of the clerk or oversight in preparing the praecipe for transcript of the record. It is not in the record because it was not submitted to the District Judge and was not filed with the Clerk of the District Court. At any rate, the Judge of the District Court does not recall having seen such a document, though he does recall an oral discussion of the matters alleged to be covered by that document (affidavit of the Honorable Robert T. Ervin, Appendix, pp. 34–42); and the Clerk of the District Court certifies that no such document was ever filed in the cause (affidavit of Virgil C. Griffin, Appendi, pp. 41–42). In view of these statements we suppose that the affidavit of Harry T. Smith (R. 83–86) must be narrowly construed, and that when the affiant stated that he "*presented* to the Judge * * * a petition for rehearing in behalf of Mrs. Leila Zimmern in said cause prior to the order of May 11, 1934," he meant nothing more than that

he informally discussed with the Judge a proposed change in the decree, but did not file a petition for rehearing. This narrow construction seems supported by Mrs. Leila Zimmern's Motion to Revoke Dismissal (R. 87–88) in which she herself assumes that the petition never was a part of the District Court's record (R. 88, lines 9–10).

If the petition was merely orally discussed before the time for appeal expired, it cannot thereafter be filed for the purpose of creating a new right of appeal. Cf. *Klein* v. *Southern Pacific Co.,* 140 Fed. 213, 215–216 (C. C. D. Ore.). The situation is unlike the cases in which it was held that where a paper had been seen, entertained, and acted upon by the lower court at the appropriate time, but had been lost or not included in the record through the misprision of the clerk, or through inadvertence, it could be supplied either by an application to the trial court, *Chicago* v. *Bigelow,* 131 U. S. App. xciii; or by an application to the appellate court, *Woodward* v. *Brown,* 13 Pet. 1, 2; *Stitt* v. *Huidekopher,* 131 U. S. Appendix cxvii; see *Hudgins* v. *Kemp,* 18 How. 530, 534; or by a suggestion to the appellate court of a diminution of the record and motion for a writ of certiorari, *Missouri, Kansas & Texas R. R. Co.* v. *Dinsmore,* 108 U. S. 30, 31; *United States* v. *Adams,* 9 Wall. 661; cf. Rule 17 of the Rules of the Supreme Court of the United States; or by stipulation and consent of the parties, *Fletcher* v. *Peck,* 6 Cranch 87, 127; see *Hudgins* v. *Kemp,* 18 How. 530, 534.

E. EVEN IF MRS. ZIMMERN'S PETITION FOR REHEARING WERE IN THE RECORD, IT WOULD NOT HAVE ENLARGED THE APPEAL TIME FOR MRS. ZIMMERN, MUCH LESS FOR ANY OF THE OTHER PETITIONERS

Even if Mrs. Zimmern's so-called Petition for Rehearing were in the record, it would not have tolled the appeal statute; because it is not the sort of petition contemplated by the rule laid down in the cases from *Brockett* v. *Brockett,* 2 How. 238, to *Morse* v. *United States,* 270 U. S. 151. See footnote 6 on page 11, *supra.* That rule was adopted in order to prevent the anomaly and avoid the possible friction which might arise if a decision of a lower court were being reconsidered and reviewed by the lower and superior courts simultaneously. See *Chicago, G. W. R. R. Co.* v. *Basham,* 249 U. S. 164, 167. Hence the rule applies only to a genuine petition for rehearing (cf. *Federal Equity Rule 69*), which seeks a reconsideration of the issues in controversy between the parties which might be contested on appeal, and does not apply to a document which seeks merely a clarifying or formal amendment as to a point not in issue between the parties. *Larkin Packer Co.* v. *Hinderliter,* 60 F. (2d) 491 (C. C. A. 10th), cf. *Long* v. *Maxwell,* 59 Fed. 948, 950 (C. C. A. 4th); *Federal Equity Rule 72.*

In the *Larkin Packer Co.* case, the trial court, in its decree adjudging that a patent claim was valid and infringed, erroneously referred to a particular exhibit, Exhibit J, as being the infringing device.

An application was made to the trial court to correct its decree by striking out reference to Exhibit J. This petition was granted, but it was held that the time for appeal ran from the original decree, not from the granting of the application to make a correction. McDermott, C. J., said at page 493:

> In the case at bar an informal application to correct the court's findings and conclusions was seasonably made. The court considered the application and granted it. But we think the application cannot be treated as a petition for rehearing. No rehearing of the issues was prayed for. All that was done was to direct the trial court's attention to an "error arising from an accidental slip or omission", which the court had power to correct without rehearing. Equity Rule 72 (28 USCA § 723); Foster's Fed. Prac. §§ 444, 445. The court originally held that Exhibit 3, with the ears removed, infringed. That holding was not changed. All the court did was to eliminate the words "Defendant's Exhibit J" which were used parenthetically to identify the modified device in the record. As far as the record discloses, this was all it was asked to do. Calling the court's attention to such an accidental slip is commendable; but it cannot fairly be called a petition for rehearing.

This reasoning applies to the instant case inasmuch as Mrs. Zimmern's so-called petition for rehearing did not pray for a rehearing of the issues, but merely directed the trial court's attention to an

error arising from an accidental slip which the court had power to correct without hearing.[10]

Furthermore, the so-called petition for rehearing failed to toll the statute because it does not appear that counsel took the steps[11] necessary to give the Government notice of the petition. *Giant Powder Co.* v. *California Vigorit Powder Co. et al.*, 5 Fed. 197, 199, 201–202 (C. C. D. Calif.) (per Field, Circuit Justice). And, finally, even if it did toll the statute for Mrs. Zimmern, it did not enlarge the time for appeal by the other respondents.[12]

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[10] It is doubtful whether petitioners' counsel originally viewed Mrs. Zimmern's document as a petition for rehearing. A cursory inspection of that document (R. 84–86) and a comparison of it with genuine petitions for rehearing filed in this very case (R. 58–60; R. 81–83), makes it clear that it more nearly resembles a memorandum of authorities than a succinct statement of the points as to which a rehearing is desired. Cf. *Public Schools* v. *Walker*, 9 Wall. 603, 604; *Merchant and Miners Transp. Co.* v. *Robinson etc. T. & T. Co.*, 194 Fed. 361 (C. C. A. 1st); *The Governor Ames*, 187 Fed. 40, 50–51 (C. C. A. 1st). Indeed the so-called petition for rehearing on its own face states that it is merely a "petition to clarify the construction of the decree" (R. 86, line 3).

[11] Although the point is not free from doubt, it seems that under the rules (printed in the Appendix) of the United States District Court for the Southern District of Alabama, one who petitions for rehearing is required to take steps which will ensure that the other side will have notice. That is, the petitioner must file his application with the clerk, *General Rule 30*, and the clerk must then give notice to counsel of record, *General Rule 12*.

[12] The Circuit Court of Appeals in this case held that a petition for rehearing tolls the appeal statute for the benefit only of the person who makes it (R. 80, lines 16–18). Although we have not been able to find any other authority which directly supports or refutes this proposition, it seems

II

The Amended Petition for Rehearing Filed by Samuel Zimmern Did Not Revive the Already Expired Right to Appeal From the Decree of March 3, 1934

To show that the appeal time was extended, petitioners also rely upon the Amended Petition for Rehearing filed by Samuel Zimmern.[13] This petition was not filed until August 13, 1934 (R. 58–60). Although the filing was during the term of the District Court (R. 57), it was more than three months after the entry of the decree of March 3, 1934 (R. 54–57).

The petition, therefore, could not extend or enlarge the appeal time. And it did not revive it.

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consistent with the rule laid down in *Sage et al.* v. *Central R. R. Co.*, 93 U. S. 412, 418–419, that where an amicus curiae petitions for rehearing, his petition does not toll the appeal statute. Indeed it may be that a petition for rehearing which is not joined in by all the parties does not operate to give even the moving party a stay of the effective date of the decree unless he gets a severance. Cf. *Hartford Accident & Indemnity Co.* v. *Bunn*, 285 U. S. 169.

[13] In their Supplemental Brief, p. 2, the petitioners for the first time refer to an "*original* petition" of Samuel Zimmern. Without repeating in detail our argument under Point I, *supra*, it will be sufficient to say that this "original petition", if it existed and could be supported by affidavit, cannot enlarge the appeal time either for Samuel Zimmern or other parties (see footnote 12, *supra*) because it is not in the record (cf. pages 11–12, *supra*), and because its existence cannot be presumed from anything in the record (cf. pages 12–15, *supra*). Moreover, a point based on this original petition cannot be considered in this Court because it was not made in the court below or in the petition for certiorari. *Clark* v. *Williard*, 294 U. S. 211, 216.

A petition for rehearing filed more than three months after entry of a final decree (even if filed within the term) does not have the effect of lifting the bar of Section 8 (c) of the Act of February 13, 1925, which had already fallen and had shut off the right of appeal. *Conboy* v. *First National Bank,* 203 U. S. 141, 145 (petition for rehearing in bankruptcy); *Brady* v. *Bernard and Kittinger,* 217 U. S. 595 (petition for rehearing in bankruptcy); *United States* v. *East,* 80 F. (2d) 134 (C. C. A. 8th) (petition for rehearing in bankruptcy). *McIntosh* v. *United States; Gilliam* v. *United States,* 70 F. (2d) 507 (C. C. A. 4th), certioraris denied, 293 U. S. 586, 587, petition for rehearing denied, 293 U. S. 631 (petition for rehearing in equity); *Northwestern Public Service Co.* v. *Pfeifer,* 36 F. (2d) 5 (C. C. A. 8th) (motion for new trial at law); *Chicago M. & St. P. Ry. Co.* v. *Leverentz,* 19 F. (2d) 915 (C. C. A. 8th), certiorari denied, 275 U. S. 543 (motion for new trial at law). As Chief Justice Fuller said in the first of these cases (page 145):

> The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing.

III

The Addition Made to the Final Decree by the District Court's Order of August 13, 1934, Did Not Revive the Already Expired Right to Appeal From the Final Decree Itself

The petitioners' third contention is that the addition made to the final decree by the District Court's

order of August 13, 1934 (R. 60–61) revived the lost opportunity for appealing from the final decree itself (R. 54–57)..

Before answering in detail this contention, it will be helpful to look at the record to see exactly what is the scope of the final decree and the scope of the amending order. The final decree, in eight numbered paragraphs, which occupy four pages of the record (R. 54–57), adjudged that (1) Samuel Zimmern is indebted to the United States for certain named sums; (2) Samuel Zimmern's conveyance of the Government Street property is set aside; (3) the joint conveyance by Samuel Zimmern and his wife of the Royal Street property is set aside; (4) "the two above described parcels of land * * * be sold by the United States Marshal" at public sale; (5) out of the proceeds of the sale of the Government Street property $2,000 be paid to Leila Zimmern in lieu of homestead exemptions; (6) subject to the $2,000 homestead claim, a trust be declared on the proceeds in favor of the United States for the amount of its tax claim; (7) in the event the proceeds are insufficient to meet the tax claim, execution issue against Samuel Zimmern's other property; and (8) in the event Samuel Zimmern's wife and children fail to note in the county record book that their deeds have been cancelled, the Clerk of the District Court shall so note.

The amending order consists of a clarifying provision four lines long (R. 61) which reads as follows:

> 9. It is further ordered and decreed that the lands and appurtenances thereto mentioned and described and ordered to be sold by this decree be sold subject to any dower rights of the respondent Leila Zimmern.

The precise contention of the petitioners is that this amendment gave a new opportunity for appealing from the final decree itself, although the original appeal time had already elapsed and, therefore, could not, strictly speaking, be "extended" or "enlarged."

The petitioners do not seek a review of the amendment itself. It is true that their appeals attempted to embrace both the final decree and the amending order (R. 61, 65, 67–68); but they had no right to appeal from the amending order since it did not harm them (*Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S., 151, 176), and in fact they have not assigned error to that order (R. 62–64, 65–67; 68–70).

Although now the petitioners make some slight suggestion that they were prejudiced by the amendment (petition for certiorari, p. 17), the suggestion is without foundation. The amendment benefited Mrs. Leila Zimmern since it preserved her inchoate dower interest against any possible extinguishment. And it did not harm Mr. Zimmern. He never claimed, and no one could properly contend, that Mr. Zimmern was entitled to have his wife's property sold to pay his debts.

The petitioners do not contend that the amendment dealt with any matter in controversy. Nor could they successfully make that contention. Mrs. Zimmern's inchoate dower was not an issue raised by the bill of complaint, the answer, the evidence or the opinion. See footnote 1 on page 3, and footnote 3 on page 4. And the Government has never supposed that it was entitled to reach Mrs. Zimmern's inchoate dower interest to pay Mr. Zimmern's taxes.

But the petitioners say that the decree was changed and this formal change, which was made two months after the appeal time had expired, which benefited Mrs. Zimmern, and which in no way affected the other petitioners, gave a fresh right of appeal.

The very face of the record shows how slight the change was. The court did not set aside the earlier decree covering four pages (R. 54–57) and replace it with an equally long and equally objectionable decree. Cf. *United States* v. *Gomez,* 1 Wall, 690, 700; *Union Guardian Trust Co.* v. *Jastromb,* 47 F. (2d) 689 (C. C. A. 6th). It merely added four lines (R. 61). And these lines, as the next paragraph points out, were of very minor consequence.

Before those four lines were added it is *conceivable* that a United States marshal, by giving a broad construction to paragraph 4 of the original decree (R. 56) might have prepared the terms of sale so as to offer at public outcry not merely the

fee interest of Samuel Zimmern in both the Government Street and Royal Street properties, but also the inchoate dower interest of Leila Zimmern in the Royal Street property.[14] But if the marshal brought this new element into the case, Mrs. Leila Zimmern would have been free to request the court to enter a decretal order fixing more specifically the precise terms of sale. Cf. *Long* v. *Maxwell,* 59 Fed. 948, 950–951 (C. C. A. 4th) (per Fuller, Circuit Justice). Or she could even have waited until the time for confirming the sale (R. 56, lines 15–16) to raise the point as to whether her inchoate dower interest was properly included; and, good cause having been shown, the District Court undoubtedly would not have confirmed the sale. Cf. *Blossom* v. *Railroad Co.* 3 Wall. 196, 207; *Graffam* v. *Burgess,* 117 U. S. 180, 192. The fact that instead of following either of these customary procedures, she chose to ask for a clarifying amendment, does not give to her or other parties a new right to appeal from the decree itself.

There is no doctrine that any minor amendment to a decree automatically revives an expired right to appeal from an original decree. Although on this point there seems to be no authority either way

[14] Leila Zimmern has no inchoate dower in the Government Street property. Prior to the final decree in the District Court, she had conveyed, as she is permitted to do by Section 7433 of the Code of Alabama (1923), her interest in the Government Street property to the First National Bank of Mobile, Alabama (R. 19; R. 37, line 17).

in this Court, the decisions of the Circuit Courts of Appeals agree that where an amendment makes merely a formal clarification of an undisputed point, it does not give a new right to appeal from the original decree.[15] *Better Packages, Inc.* v. *L. Link and Co.*, 74 F. (2d) 679 (C. C. A. 2d), certiorari denied, 295 U. S. 751; *Stradford* v. *Wagner*, 64 F. (2d) 749 (C. C. A. 10th); cf. *Larkin Packer Co.* v. *Hinderliter Tool Co.* 60 F. (2d) 491, 494 (C. C. A. 10th). And the prevailing view in the state

[15] Compare the rule that, since it does not affect the issues in suit, an amendment to the decree which taxes costs does not extend the appeal time. *Fowler* v. *Hamill*, 139 U. S. 549; *United States* v. *Nordbye*, 75 F. (2d) 744, 746 (C. C. A. 8th); *The Albatross*, 19 F. (2d) 141 (C. C. A. 3d); *The Washington*, 16 F. (2d) 206, 209 (C. C. A. 2d); *Allis-Chalmers Co.* v. *United States*, 162 Fed. 679 (C. C. A. 7th); *Prescott & A. C. Ry. Co.* v. *Atchison, T. & S. F. R. Co. et al.*, 84 Fed. 213 (C. C. A. 2d); *Crowell et al* v. *United States*, 281 Fed. 835 (D. Mass.). Compare also the rule that a decretal order giving further directions as to a matter covered by a prior order does not extend the time for appealing from the prior order. *Hill* v. *Chicago & Evanston Railroad Co.*, 140 U. S. 52; *Sage* v. *Railroad Co.* 96 U. S. 712, 714; *Long* v. *Maxwell*, 59 Fed. 948 (C. C. A. 4th); *Baxter* v. *Bevil Phillips & Co.*, 219 Fed. 309 (S. D. Ala.); *Beaven* v. *Countess of Mornington*, 8 H. L. C. 525; 11 Eng. Rep. 534. And compare the rule that a court has the power to vary in minor respects the provisions of a decree of sale, even after the term at which the decree was entered has expired. *Fulton Inv. Co.* v. *Dorsey*, 220 Fed. 298 (C. C. A. 8th); *Mootry* v. *Grayson*, 104 Fed. 613 (C. C. A. 9th).

courts seems to be the same,[16] though there may be some cases to the contrary.[17]

Of the Federal cases cited, two are particularly relevant. In *Better Packages, Inc.* v. *L. Link & Co.*, 74 F. (2d) 679, 680–681 (C. C. A. 2d) the original decree had enjoined infringement not only of a valid patent claim, but also of an invalid claim which was not being pressed by the patentee. The District Court, upon the infringer's suggestion, made an amendment striking from its decree all reference

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[16] There are a number of state cases which indicate that the time to appeal runs from the date of an original decree and not from purely formal amendments thereto. This principle has found application in cases where the amendment struck out superfluous provisions, *Hall* v. *Brown*, 139 App. Div. 388, 124 N. Y. Supp. 52 (3d Dept.); where the amendment favored the appellant by removing from the original judgment sums which the appellant otherwise would have been required to pay, *Chenoweth* v. *Chenoweth*, 64 Indiana App. 260, 114 N. E. 988, or to which the appellant's claim would otherwise have been subject, *Fidelity Philadelphia Trust Co.* v. *Brown*, 181 Minn. 466, 233 N. W. 10; *Savings and Loan Society* v. *Horton*, 63 Cal. 310; where the amendment made the decree conform to the exact language of the opinion, *Cody* v. *Cody*, 47 Utah, 456, 154 Pac. 952; where the amendment made the judgment correspond with the verdict, *Alabama Coal and Navigation Co.* v. *State*, 54 Ala. 36; and where the amendment corrected the original order of judgment so that proper parties were named, *Schulze* v. *Oregon R. R. and Nav. Co.*, 41 Wash. 614, 84 Pac. 587; *Besser* v. *Alpena Circuit Judge*, 155 Mich. 631, 119 N. W. 902.

[17] Many of the state cases upon which the petitioners rely to establish a contrary rule are distinguishable. *In the Matter of Potter*, 141 Cal. 350, 74 Pac. 986, held that an amendment to tax costs extends the appeal time. This decision is contrary to the uniform current of Federal decisions, see note 15 on page 28, *supra*, and so has no great weight in this

to the invalid claim. It was held that the time to appeal ran from the date the original decree was entered, and not from the later date on which it was amended.

Court. In *Hayes* v. *Silver Creek Co.*, 136 Cal. 238, 68 Pac. 704, the nature of the amendment is not disclosed in the report, and it is impossible to know how vitally it affected the original decree. *Spencer* v. *Troutt*, 133 Cal. 605, 65 Pac. 1083, involved a serious amendment because it added to the decree the name of the very person who sought to appeal. Obviously he could not have appealed before the amendment as he was not aggrieved until it was made. In *Johnson* v. *Foreman*, 24 Ind. App. 93, 56 N. E. 254, the objection was not to the original decree but *to the amendment itself*. The time for appealing from the amendment, of course, runs from the time it was entered, not from some earlier date. *Billson* v. *Lardner*, 67 Minn. 35, 69 N. W. 477, presented a case in which the trial court, by a so-called amendment, made completely new findings. That, of course, was a radical change in the decree. The Texas Court of Civil Appeals held in *Hall* v. *Read*, 28 Tex. Civ. App. 18, 66 S. W. 809 (contrary to the decision in Indiana cited in footnote 16) that a change in the number of dollars to be paid the appellant was a vital amendment tolling the appeal statute. In *Partridge* v. *Wooton*, 63 Tex. Civ. App. 280, 137, S. W. 412, it was not possible to appeal from the original decree; but appeal became possible when the amendment was made. Naturally the appeal period did not begin until the amendment was made. In *Henry* v. *Boulter*, 26 Tex. Civ. App. 387, 63 S. W. 1056, it appeared that an order had been orally made on November 19, 1896, but not entered until four or five years later. It was held that the time for appeal ran from the time the order was actually entered. *Vincent* v. *Vincent*, 3 Mackay (14 Dist. of Col.) 320, merely held that an appeal taken while the trial court was considering a petition for rehearing should be dismissed as prematurely taken, especially since it appeared that the petition for rehearing was successful in procuring an amendment as to one of the matters included in the appeal.

In *Stradford* v. *Wagner*, 64 F. (2d) 749 (C. C. A. 10th) Stradford, claiming to be the equitable owner of property, brought a bill in equity to have cancelled a mortgage on that property held by a Savings and Loan Association. The Association brought a cross-bill to foreclose the mortgage. On May 22, 1931, the District Court entered a decree (1) ordering a foreclosure sale, (2) directing that the proceeds be brought into court, and (3) barring Stradford from all right and title to the property and, presumably, the proceeds. On December 22, 1931, Stradford filed a petition for rehearing asking that the foreclosure be set aside. On February 27, 1932, the District Court entered an order "that the decree should not be set aside, but modified to the effect that the master's sale of the property should be free of all claims of plaintiff (Stradford) without prejudice to his assertion of his right to proceeds" (page 751). Thereupon Stradford sought an appeal from the order as modified. It was held that the appeal was too late since the time ran from the date on which the original decree was entered. The court said at page 751:

> Appellant urges, in a petition for rehearing, that where a chancellor seasonably and substantially modifies a decree in equity, time for appeal runs from the entry of the modified decree. That may be conceded. But appellant's complaint is not directed at the so-called modification, but at the original

decree ordering a sale, which was not modified.

The decree of foreclosure was entered in May, 1931, and time for appeal expired in August, 1931. In December, a petition for rehearing was filed. That petition was denied, and an order entered which did not alter or modify the decree of foreclosure, but simply permitted appellant to assert any claim he might have against the proceeds. Appellant has not, and does not, complain of the permission so accorded him; his complaint has been, and is, that the court erred in ordering a sale of the property in May. The effort is therefore to appeal from the 1931 decree long after it became final—an attempt to do indirectly that which cannot be done directly.

The instant case falls well within these authorities. The petitioners applied for appeals from a decree of the District Court five and one-half months after it was entered and two and one-half months after the appeal time had expired. And they offer as an excuse for their delay an amendment made at their request, and to benefit them, after the regular appeal time had expired, and as to a minor formal matter which could, at their option, have been remedied in another way than by an amendment to the decree. It is submitted that the excuse is insufficient, and that the amendment did not revive a right to appeal which had expired months before the amendment was made.

CONCLUSION

We respectfully submit that the order of the court below dismissing the appeals because they were not timely taken was correct and therefore should be affirmed.

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Special Assistants to the Attorney General.

MARCH 1936.

APPENDIX

Federal Equity Rules

RULE 69

Petition for Rehearing

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the circuit court of appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

RULE 72

Correction of Clerical Mistakes in Orders and Decrees

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

Rules of the United States District Court for the Southern District of Alabama Adopted September 1, 1928

GENERAL RULE 12

Motions.—Any motion, in any cause pending in this court, may be brought before the court at any

time designated by the judge, whether in vacation or in term time.

The first and third Mondays of each month shall be motion or rule day in common law, equity, and admiralty cases. The clerk shall, from time to time, set for hearing on the then next following rule day, motions and other questions arising upon the pleadings or otherwise and not involving any trial of issues of fact, and shall give to counsel of record in each case so set, notice thereof, by telephone or otherwise; but in no instance shall a case be set for any rule day less than three days in advance of such rule day.

GENERAL RULE 30

Applications in chambers.—All applications made to the judge at chambers or in vacation, for any order in any case, must be in writing; and all orders made thereon must be in writing. Such applications must be filed in the clerk's office.

UNITED STATES OF AMERICA,*
Southern Division, Southern District of Alabama.

PERSONALLY appeared before me, the undersigned, a Notary Public in and for the State of Alabama and County of Mobile, ROBERT T. ERVIN, who is known to me and who upon being by me first duly sworn doth depose and say that he is a United States District Judge for the Southern District of Alabama; that as such Judge he presided as trial Judge at the hearing of that certain equity cause, No. 132, in the District Court for the Southern District of Alabama, filed by the United

*The original affidavit, of which this is a copy, has been filed with the Clerk of the Supreme Court of the United States.

States of America on October 15, 1929, entitled United States of America v. Samuel Zimmern, Leila Zimmern, Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern; that as Judge in said cause he signed all decrees and all orders of record in said cause in the United States District Court, Southern District of Alabama; that he has examined a copy of "Exhibit A" attached by the appellants to the appellants' petition for rehearing in the Circuit Court of Appeals for the Fifth Circuit, and that in order to identify "Exhibit A" to which affiant refers, he attaches to this affidavit a copy of said "Exhibit A" of appellants. Affiant further says that the original of the paper marked "Exhibit A", a copy of which was appended by the appellants to their petition for rehearing in the Circuit Court of Appeals, Fifth Circuit, has never been filed with him, either by the appellants or by Harry T. Smith, or by any other person.

Affiant says that on an occasion subsequent to the rendering of the decree of March 3, 1934 in said cause, Harry T. Smith, Esq., who was then one of the solicitors in said cause, on behalf of appellant, Leila Zimmern (Mrs. Samuel Zimmern), came to the office of affiant in connection with this case. On that occasion Mr. Smith had a paper in his hand which he stated to affiant was a petition to amend the decree of March 3, 1934, in order to exclude from sale the dower interest claimed by Mrs. Leila Zimmern. Affiant did not see the paper which Mr. Smith had with him nor was the paper left with affiant, who assumes that it was the original of which "Exhibit A" is a copy. After Mr. Smith verbally presented his views with reference to the

protecting of Mrs. Zimmern's dower interest, affiant expressed himself in agreement and stated that he saw no reason why there should be any difficulty with reference to amending the decree in that particular but suggested that Mr. Smith see Hon. Alex Birch, who was then United States Attorney; and that Mr. Smith then left the office of the affiant, stating that he would call on Mr. Birch. The paper which Mr. Smith brought to the office of affiant was not left with the affiant nor exhibited to the affiant nor did he read it. Affiant is unable to determine the exact or approximate date of the conversation referred to, but later, and on August 13, 1934, the decree of March 3, 1934, was amended by the addition of a paragraph expressly providing that the sale of property should be subject to the dower interest claimed by Mrs. Zimmern. Affiant further says that in said cause no motion or petition for rehearing has ever been filed with him either by the appellants themselves, by Harry T. Smith, Esq., or by any other person, and that the only petition for a rehearing ever filed, to the knowledge of affiant, is the petition for rehearing filed on August 11, 1934.

Subscribed and sworn to before me this 23rd day of March, 1936.

[SEAL]

ROBERT T. ERVIN.
ANITA GUICE,
Notary Public, Mobile County, Ala.

EXHIBIT "A"

In the United States District Court for the Southern District of Alabama

In Equity. No. 132

UNITED STATES OF AMERICA, COMPLAINANT

v.

SAMUEL ZIMMERN, ET AL., DEFENDANTS

PETITION FOR REHEARING

Ordinarily a decree for the sale of land belonging to one of the defendants, needs no qualification as to the title which is to be sold, as it could not be binding on any person owning an interest in the land who is not a party to the case. When, however, a decree of sale condemns and orders the sale of certain property, without specifying whose interest in the property is to be sold, it purports to operate as a sale of the interest of all of the defendants in the cause. For instance, the decree in this case, which orders the property to be sold as a whole without any reference whatever to the question as to whose title it is that is condemned, would include a sale, not only of the interest which is vested in the debtor, Samuel Zimmern, but also the dower interest which is vested in Mrs. Leila Zimmern, who is not indebted to the United States Government and whose dower interest in the property is not subject to sale under execution against her husband, Samuel Zimmern, and which dower interest could not be made subject to the payment of Mr. Zimmern's debts by setting aside and can-

celling the deeds conveying to her and to her children the interest of her husband which was subject to execution for his debts. The several conveyances which were executed by Samuel Zimmern to his wife and children, respectively, having been declared to be void and having been set aside and cancelled, the title to this property stood, of course, precisely as if no such conveyances had been executed, that is to say, the title which is vested in Samuel Zimmern is subject to the dower rights of Mrs. Zimmern, and this dower right cannot be sold for the payment of her husband's debts. The authorities to this effect are gathered in the 19th Corpus Juris, page 519, where it is said:

> Where the lien of the execution under which the lands of a husband were levied upon and sold antedated the marriage, the wife's dower right is thereby divested. But if the wife's dower had attached at the time the lien arose, her right to dower is not impaired thereby in the absence of special statute changing the rule, and the purchaser at the execution sale acquires no greater or better title, so far as such right is concerned, than could have been vested in him by the voluntary conveyance of the husband at the date of the inception of the lien.

There are a great many authorities cited in Note 83 on page 520 in 19 C. J., to the same effect, including—

> *Callahan* v. *Nelson,* 128 Ala., 671.
> *Wood* v. *Morgan,* 56 Ala., 397.
> *Nance* v. *Hooper,* 11 Ala., 552.

The reason for the distinction to which we have referred between cases where the wife is not a

party, so that a decree of sale could not possibly be construed as intended to include her dower interest, on the one part, and cases where the wife is a party and the terms of the decree are broad enough to cover the entire interest in the property sold, is pointed out in the 19th Corpus Juris, page 519.

Of course, the question as to whether the decree is to be construed as intending to order the sale of the entire interest or only the interest of the debtor (husband) in the property, or in other words, whether the decree intends to subject the dower interest vested in the wife or not, is a matter of construction, but we are afraid that the language of the decree, as rendered, is broad enough to cover all interests in the property, and if such a construction should be placed upon it, then Mrs. Zimmern, being a party to the case, would be bound by the decree, howsoever erroneous it might be in this particular, and her only remedy is by this petition to clarify the construction of the decree in this particular or by appeal. We are quite well assured that it was not the intention of the Court to condemn Mrs. Zimmern's dower interest in this property, which was not subject to this debt, and we are, therefore, petitioning for a modification of the decree in this respect.

We do not imagine that the Court had any purpose to so order. Our thought is that in drawing this decree, the Court intended only to condemn the interest in the property which was owned by the debtor (husband) and simply overlooked the fact that as Mrs. Zimmern was a party defendant, it was necessary to specify in the decree that it was the interest of the husband that was to be con-

demned and sold and not the interest of the wife, who was in no wise indebted and whose dower right could not be subjected to the payment of her husband's debts.

For these reasons, we respectfully apply, on behalf of Mrs. Samuel Zimmern, for a rehearing, to the extent of modifying the decree of sale so as to refer exclusively to her husband's interest in this property and not to include her dower interest.

Respectfully submitted.

HARRY T. SMITH & CAFFEY.

In the District Court of the United States for the Southern District of Alabama—Southern Division*

In Equity, No. 132

UNITED STATES OF AMERICA, COMPLAINANT

v.

SAMUEL ZIMMERN ET AL., RESPONDENTS

I, Virgil C. Griffin, Clerk of the United States District Court in and for the Southern District of Alabama, do hereby certify that no motion or petition for rehearing or for a new trial was filed in the above entitled cause between the rendition of the final decree therein on the 3d day of March, 1934, and the 11th day of August, 1934, and that the only motion for rehearing at any time filed in said cause was filed on the 11th day of August, 1934, and is set out on pages 72–74 of the record of this cause which has been transmitted to the United

* The original affidavit, of which this is a copy, has been filed with the Clerk of the Supreme Court of the United States.

States Circuit Court of Appeals for the Fifth Circuit, all as shown by the records of said court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Mobile, Alabama, this 22nd day of October, 1935.

[SEAL OF COURT] [s] VIRGIL C. GRIFFIN
Clerk.

By ——— ———
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1936

SUPREME COURT OF THE UNITED STATES.

No. 766.—October Term, 1935.

Samuel Zimmern, et al., Petitioners, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 27, 1936.]

Mr. Justice Cardozo delivered the opinion of the Court.

The question in this case is whether the petitioners appealed to the Circuit Court of Appeals within the time prescribed by law.

The United States brought suit to set aside a deed by Samuel Zimmern to his wife, and another deed, in which the wife joined, to his children, a separate parcel of real estate being the subject of each. At the time of the conveyance Samuel Zimmern was indebted to the complainant for a deficiency of income taxes duly assessed against him. The deeds were attacked upon the ground that they had been made without consideration and with fraudulent intent. The District Court after a trial sustained the charge of fraud and gave judgment in favor of the complainant for the relief prayed for in the bill. Its decree, which was entered on March 3, 1934, directed a sale of the two parcels, and the payment of the proceeds to the United States to be applied upon the taxes after deducting what was due to the wife by reason of a homestead exemption allowed by the local law. Nothing was said in the decree as to the exception or reservation from the sale of her inchoate right of dower.

The term at which the cause was tried would have expired, unextended, on May 28, 1934. However, before that date, the judge made an order extending the term for ninety days, the order being prefaced with the following recital: "It appearing to the court that a decree was entered in this cause on March 3rd, 1934 and for good reason shown it will be necessary to modify or amend

said decree.''* No petition for rehearing in behalf of the wife, Leila Zimmern, appears in the record, nor any motion for an amendment. A petition in behalf of Samuel Zimmern does appear, but it was filed on August 11, 1934, when the time to appeal had already gone by if the original decree was then presently in force. Cf. *Conboy* v. *First National Bank of Jersey City*, 203 U. S. 141, 145. Two days later the judge made an order amending the decree by directing that the sale be subject to any dower rights of the wife, and in all other respects denying whatever motions were before him. Appeals by all the defendants were taken and allowed. Under the applicable statute (28 U. S. C. § 230), the appeals were too late if the time is to be computed from the date of the decree as originally entered. They were regular if the time is to be computed from the date of the amendment. The Court of Appeals held that what had been corrected by the amendment was an accidental slip or omission, not affecting the issues in suit (Federal Equity Rule 72), and inoperative to toll the statute. Accordingly, the appeals were dismissed, two opinions being written, one upon the original hearing and the other upon rehearing. 79 F. (2d) 703; 80 F. (2d) 993. This court granted certiorari to review a ruling as to practice that might tend, if erroneous, to introduce confusion into the law.

We think the decision misapprehends the effect of the order of May 11, 1934, in which the judge who had tried the cause declared himself dissatisfied with the decree that he had made, and to give himself an opportunity to make the necessary changes extended the term then drawing to a close. He did not limit the amendment to matters of form only as distinguished from those of substance. He did not act, so far as the record shows, at the instance of the defendants, still less upon a showing of error in only one particular. He stated broadly and, for all that appears, of his own motion that

*For greater certainty the terms of the order are here stated in full:

''It appearing to the Court that a decree was entered in this cause on March 3rd, 1934 and for good reason shown it will be necessary to modify or amend said decree,

''It is, therefore, ordered and adjudged by the Court that the November Term of this Court which expires on the 28th day of May, 1934 be, and the same is, extended for ninety (90) days from that date, in which time all matters and orders in connection with this cause and the amendments of the decree may be entered.

''Done this 11th day of May, A. D., 1934.

ROBERT T. ERVIN, Judge''.

changes must be made, and without a word to indicate whether he meant them to be great or little. We think the effect of that order was to suspend the operation of the decree so that no appeal could be taken from it until it had been amended or confirmed, and its vigor thus restored. Until such action had been taken it was no longer a decree at all. The judge had plenary power while the term was in existence to modify his judgment for error of fact or law or even revoke it altogether. *Doss* v. *Tyack,* 14 How. 297, 313; *Basset* v. *United States,* 9 Wall. 38, 41; *Bronson* v. *Schulten,* 104 U. S. 410, 415; *Henderson* v. *Carbondale Coal & Coke Co.,* 140 U. S. 25, 40. Finality was lacking until his choice had been announced.

The appeals being timely, the decree which dismissed them should be reversed, and the cause remanded to the Court of Appeals for the Fifth Circuit for further proceedings in harmony with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.